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Nos. 374 and 375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THE TIMES-PICAYUNE PUBLISHING COMPANY, ET AL.

Appellants

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,

Appellant

v.

THE TIMES-PICAYUNE PUBLISHING COMPANY, ET AL.

On Appeal from the United States District Court for the Eastern District of Louisiana

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BRIEF FOR THE TIMES-PICAYUNE PUBLISHING COMPANY, ET AL.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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OPINION BELOW

The opinion of the District Court for the Eastern District of Louisiana is reported at 105 F. Supp. 670 (R. 1233-1252).

JURISDICTION

The judgment of the District Court was entered on July 1, 1952 (R. 1263-1266). The petition for appeal in No. 374 was filed and allowed on July 30, 1952 (R. 1266-1268). The petition for appeal in No. 375 was filed

and allowed on August 29, 1952 (R. 1278-1279). The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on November 10, 1952 (R. 1284).

QUESTIONS PRESENTED

The Times-Picayune Publishing Company, a newspaper publishing company serving the New Orleans area, publishes thirteen issues each week from its one plant: The Times-Picayune daily in the morning, the New Orleans States daily in the evening and The Times-Picayune-New Orleans States on Sunday. Advertisers desiring to place either classified advertising or general (national) advertising with the Publishing Company for insertion on a day other than Sunday can do so only by contracting to run the advertisement in both The Times-Picayune and the New Orleans States. The primary questions presented are:

(1) Whether the contracts for the sale of classified advertising space are contracts in unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

(2) Whether the contracts for the sale of general advertising space are contracts in unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

(3) Whether the promulgation and use of the contracts for the sale of classified and general advertising space amounted to an attempt to monopolize in violation of Section 2 of the Sherman Act.

(4) If it should be held that the court below was correct in ruling that the Sherman Act has been violated,

whether it erred in framing its decree.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2 and 4), commonly known as the Sherman Act, are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

STATEMENT

The United States filed a civil action against The Times-Picayune Publishing Company (hereinafter sometimes referred to as the "Publishing Company") and four of its officers and employees on June 14, 1950, under the provisions of Section 4 of the Sherman Act

charging them with violating Sections 1 and 2 of that Act (R. 1-9).

The defendants[1] named in the complaint are The Times-Picayune Publishing Company, a Louisiana corporation engaged in the newspaper publishing business, which publishes The Times-Picayune (morning), the New Orleans States (evening), and The Times-Picayune-New Orleans States (Sunday), L. K. Nicholson,[2] President of the Publishing Company, John F. Tims, Jr., Vice-President and General Manager,[3] Aubrey Murray, Advertising Director, and Donald W. Coleman, Circulation Manager.

The complaint alleged in so far as now material that (1) the Publishing Company had entered into contracts in unreasonable restraint of trade in newspapers, news, advertising, supplies and nationally advertised products in violation of Section 1 of the Sherman Act and (2) all of the defendants had engaged in an attempt to monopolize interstate commerce in newspapers and the dissemination of news and advertising in violation of Section 2 of the Act.

PROCEEDINGS BELOW

The Government filed a motion for partial summary judgment with respect to the alleged violation of Section 1, which motion was heard and denied by the court below on February 20, 1951 (Tr. Motion for Partial Summary Judgment, p. 69). On April 30, 1951, the cause came on for hearing and the taking of evidence was concluded

[1] For the convenience of the parties and the Court the defendants below (appellants in No. 374 and appellees in No. 375) will sometimes hereinafter be referred to as "the defendants".

[2] L. K. Nicholson died during the pendency of this appeal.

[3] John F. Tims, Jr. has succeeded L. K. Nicholson as President of the Publishing Company.

May 17, 1951. Forty-nine witnesses testified for the Government and twelve for the defendants. The court admitted in evidence 145 exhibits offered by the Government (Exs. G-6-G-8, incl., Exs. G-14-G-156, incl.) and 24 exhibits offered by the defendants (Exs. D-1-D-24, incl.). Final arguments were heard on July 12, 1951.

On May 27, 1952, the district court filed an opinion holding that the classified and general advertising contracts entered into by the Publishing Company with advertisers were in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act and that the Publishing Company by promulgating and entering into such contracts had attempted to monopolize trade and commerce in violation of Section 2 of the Sherman Act. It also held that three of the four individual defendants had violated Sections 1 and 2 by formulating and effectuating the contracts on behalf of the Publishing Company (R. 1233-1252).[4]

The court below entered a decree against the Publishing Company on July 1, 1952, enjoining and restraining the Publishing Company, its officers, agents and employees from: (1) offering to sell or selling advertising space in any newspaper published by it only upon the condition that the purchaser shall contract for advertising in any other newspaper published by it; (2) refusing to contract to sell or refusing to sell advertising space separately in each newspaper it publishes; and (3) using the dominant position of the Publishing Company in the morning field to sell any newspaper advertising at rates lower than those approximating either the cost of producing and selling such advertising or comparable news-

[4] The court held that defendant Coleman had not participated in any violation of law and accordingly dismissed the suit as to him (Op., R. 1252).

paper advertising rates in New Orleans (Decree, Sec. V, R. 1264-1265).

THE EVIDENCE

A.

The newspaper publishing business in New Orleans.

The Publishing Company and The Item Company are both engaged in the newspaper publishing business in New Orleans. Prior to 1933, the Publishing Company published a newspaper daily in the morning and on Sunday known as The Times-Picayune. In 1933 the Publishing Company purchased the name, goodwill, circulation, advertising contracts, features and news contracts of the Daily States Publishing Company, which published a newspaper daily in the evening and on Sunday under the name New Orleans States (R. 190). It did not purchase the plant and physical equipment of the Daily States Publishing Company since it had a fully equipped plant at that time suitable for the additional publication of an evening issue. (R. 191, R. 940-944, 1159-1160.)[5]

Since the acquisition of the New Orleans States the Publishing Company has published the States as an evening issue and combined the Sunday edition of the States with the Sunday edition of The Times-Picayune to form The Times-Picayune-New Orleans States (R. 193).

Since the sale of the States by the Daily States Publishing Company, the only competitor of the defendant

[5] The Government charged that the purchase of the States in 1933 together with the restrictive covenants contained in the contract of sale evidenced a course of conduct constituting part of an attempt to monopolize. The court rejected this contention holding that the terms of sale were legal and customary and that the Government had utterly failed to prove that the purchase was in furtherance of an attempt to monopolize (Op., R. 1250).

Publishing Company engaged in publishing in New Orleans a newspaper of general circulation has been The Item Company.[6] For many years prior to 1941 The Item Company published morning, evening and Sunday issues called the Morning Tribune, The Item (evening) and the Sunday Item Tribune (R. 12, 189-190). Publication of the Morning Tribune and the Sunday Item Tribune was discontinued in 1941 (Fdg. 7, R. 1253; R. 451, 682). From 1941 to 1950, The Item was published as a six-day evening newspaper (R. 12). In March, 1950, a Sunday edition was added (R. 637). However, in December, 1950, The Item Company changed to its present method of operation by which it publishes The Item each evening Monday through Friday plus a weekend edition which comes out on Saturday under a Sunday dateline (Fdg. 13; R. 1255).

On the basis of circulation and advertising lineage the court below concluded that The Times-Picayune (morning) is the "dominant newspaper" of New Orleans and its trading territory. It found that there are no other daily morning newspapers published in New Orleans which compete with The Times-Picayune for local and national advertising in the morning field, that in the years 1949 and 1950 its circulation was equal to the combined circulation of both the States and The Item[7] and that for at least twenty years it has been the largest newspaper in New Orleans in circulation, advertising lineage and number of published pages. (Fdg. 15, R. 1255.) However, the court also found that the news-

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[6] The present company is the successor to The Item Company, Inc., which, in turn, was the successor to The Item Company, Ltd. (R. 3, 12).

[7] This is an error since the daily average circulation of The Times-Picayune (before adjustments) in 1950 was 188,402 as compared to 105,235 for the States and 114,660 for The Item. (Fdg. 34, R. 1260.)

paper publishing field in New Orleans is open to anyone desiring to engage therein. There are features, news services, editorial assistance, labor and supplies available for the operation of competing newspapers in addition to those already engaged in the business in New Orleans. (Fdg. 16, R. 1255-1256.)

B.

The Publishing Company.

The court below found that The Times-Picayune (morning and Sunday) and the New Orleans States (evening) were two separate and distinct newspapers reaching separate groups of readers, being produced in part by separate organizations, having separate news, features and editorial content, having different and distinctive make-up and appearance and having been treated as separate newspapers by the defendants (Fdg. 12, R. 1255). A proper interpretation of the court's finding can only be made in the light of the other findings of fact and the undisputed evidence.

The Times-Picayune (morning), the New Orleans States (evening) and The Times-Picayune-New Orleans States (Sunday) are printed at and distributed from the building of the Publishing Company in New Orleans where that company owns, maintains and operates printing presses, linotypes and all other equipment necessary to the newspaper publishing business. Practically all of the officers, department heads, superintendents, pressmen and all other employees of the Publishing Company devote their time to the printing, publishing and circulation of all of its issues, and for such purpose the offices, other space, presses and virtually all other equipment are used for morning, evening and Sunday publication.

Fdg. 8, R. 1253-1254; Exs. D-5-D-13, incl., R. 525, 626-1634; R. 459-461, 712-715, 1149-1158.)[8]

All income derived from printing, publication, circulation and advertising is received solely by the Publishing Company. All officers and employees rendering service with respect to the printing, publication and circulation of all publications of the Publishing Company are paid solely by the Publishing Company. All newsprint, ink and other supplies are paid for by the Publishing Company. All bank accounts are maintained in the name of the Publishing Company and all safe deposit boxes are in its name. The title to all property is in the Publishing Company. No bank accounts or safe deposit boxes are in the name of The Times-Picayune, the New Orleans States, or in any other name except that of the Publishing Company. No title to any property is in the name of the New Orleans States. The name New Orleans States is merely a name given by the Publishing Company to its evening issue and to the Sunday issue in conjunction with the name The Times-Picayune. (R. 193, 1018-1019, 1160.)

The Publishing Company operates on an around-the-clock basis. The press times of The Times-Picayune and the States are as follows (Exs. G-93 and G-94, R. 223, 1410-1413):

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[8] The evidence is that 71.6% of all of the employees of the Publishing Company work on all its publications. The percentage of employees devoting their time to the morning and Sunday publications only is 12.6%, evening and Sunday only is 5.7%, evening only is 3.9% and Sunday only is 6.2% (Ex. D-5, R. 525,1626; R. 1149-1151). The evidence further is that 93.4% of the equipment of the Publishing Company is used on all three publications, .008% is used morning and afternoon, .61% is used morning and Sunday, .14% is used afternoon and Sunday, .29% is used evening only, and 5.56% is used Sunday only (Ex. D-6, R. 525, 1627; R. 1151-1154). Virtually every square inch of floor in the Publishing Company's building is utilized for the publication of the morning, evening and Sunday publications (Exs. D-7 to D-13, incl., R. 525, 1628-34; R. 1154-1157).

NEW ORLEANS STATES

Press Run	*Press Time*
1st	8:50 A. M.
2nd	9:55 A. M.
3rd	11:43 A. M.
4th	12:08 P. M.
5th	1:44 P. M.
6th	3:37 P. M.

THE TIMES-PICAYUNE

Press Run	*Press Time*
1st	6:36 P. M.
2nd	9:27 P. M.
3rd	10:55 P. M.
4th	11:13 P. M.
5th	12:31 A. M.

The editorial policy of the morning and evening issues is the same. Both support the same movements, candidates and political activities. (R. 613-614.) The Times-Picayune and the States generally carry different editorials just as they carry different news articles, since timeliness in publication of a newspaper is controlling. Frequently the editorials in one publication are changed from one press run to the next and it is recognized practice to change news articles and the position of news articles in various press runs. (R. 614-615, 627-629.)

Clearly the picture is that of an around-the-clock newspaper publishing operation conducted by a single publisher serving a single market. The Publishing Company publishes The Times-Picayune during part of the day and during another part of the day it publishes its evening issue, the States.

C.

The Advertising Contracts of the Publishing Company.

Newspaper advertising is divided into three categories: classified, local or retail display, and general or national advertising (R. 4, 13, 40). In the sale of newspaper advertising publishers in New Orleans compete with other newspapers and other advertising media, including radio, television, magazines and billboards in New Orleans and elsewhere (Fdg. 27, R. 1258; R. 86-87, 254-255, 361, 446-448, 598). Therefore, the competitive rates offered by these media are important factors in determining advertising rates offered by any newspaper. The successful operation of a newspaper requires the development of a rate structure that will be attractive to advertisers and remunerative to the newspaper publisher. (R. 254-255, 332-333.)

1. Classified Advertising.

The Publishing Company established a unit combination rate for classified advertising on March 15, 1935, and has continued this practice to the present time[9] (R. 666-667, 1127). Under this rate structure advertisers are required to purchase space in The Times-Picayune (morning) and the States (evening) as a unit, and are not permitted to buy space in either separately.[10]

At the time that the unit rate was adopted about 125 publishing companies publishing morning and eve-

[9] Prior to 1935 the Publishing Company had had both separate rates and an optional combination rate. There was no change in the rates charged by the Publishing Company on the morning and evening combination at the time that it changed from the optional to the unit rate structure. (Exs. G-19 and G-20, R. 212, 1307-1308; R. 449-450, 690-692.)

[10] An exception is made in the case of over-the-river classified advertising appearing only in the States which the trial court held to be relatively unimportant. (Fdg. 29, R. 1256.)

ning had unit rates for classified advertising (Fdg. 20, R. 1256; R. 445-446, 470). As a matter of fact, in 1924 The Item Company, Ltd., publishing the Morning Tribune (morning) and The Item (evening), established a unit combination rate for classified advertising. This rate structure remained in force until 1941 when the publication of the Morning Tribune was discontinued. (Fdg. 20, R. 1256; Exs. G-19 and G-20, R. 242, 1307-1308; R. 451, 682.) Thus the adoption of the unit rate for classified advertising by the Publishing Company in 1935 placed it on an equal footing with its competitor insofar as the rate structure was concerned.

The trial court found that in 1934, prior to the adoption of the unit combination rate, the States carried less than one-half of the amount of classified lineage carried by The Times-Picayune. By 1936, after the adoption of this rate structure, the classified lineage of the New Orleans States had risen to a par with that of The Times-Picayune. (Fdg. 21, R. 1256-1257). This was the obvious and necessary effect of establishing the unit combination rate structure because space was sold equally in The Times-Picayune and the States as a unit just as it was in the competing Morning Tribune and The Item, which also had equal classified lineage (Ex. G-106B, R. 512, 1448; R. 246).

The court also found that during the fifteen years from 1936 to 1950 the spread in lineage between The Times-Picayune and States combination and The Item steadily increased. In 1950 classified lineage carried by The Times-Picayune and the States approximated four and one-half million lines each, more than double The Item's lineage. In 1934 the States carried 35% of the classified lineage in the evening field and by 1950 it carried 68% of such lineage. (Fdg. 21, R. 1256-1257.)

The above finding is based upon Exhibits G-106A nd B (R. 512, 1447-1448) which also show that from 942, when The Item was solely engaged in publishing six-day evening newspaper until 1950, when The tem resumed its Sunday edition, The Item increased ts classified advertising volume by nearly 150%, subtantially in excess of the Publishing Company's gain luring that period (R. 558-559).[11] This period is a fair est period since prior to 1942 The Item was engaged in he same practice as the Publishing Company with repect to unit combination rates on classified advertising nd subsequent to this test period The Item commenced he publication of a Sunday edition which, as in the case f general advertising, probably drained some lineage rom the daily Item (R. 1117-1119).

The Government called only five classified adverisers as witnesses in this case. The evidence establishes that about 2500 classified advertisements appear n each The Times-Picayune (morning) and the New Orleans States (evening) and about 5000 appear in the Sunday publication (R. 693-694, 1130). Hence, the testimony of only five advertisers out of thousands is of ittle, if any, value in attempting to determine the effect f the unit rate on classified advertisers.

Based solely on the testimony of the five classified dvertisers the trial court stated in its opinion that "a number of classified advertisers"[12] testified that The Times-Picayune was their first choice, four testified that

[11] The lineage figures contained in Exhibit G-106B (R. 512, 1448) ndicate that from 1942 to 1949 The Item increased its classified dvertising lineage by 145% whereas the Publishing Company, daily, xperienced an increase of only 122%.

[12] The statement of the trial court that "a number of classified dvertisers testified" is obviously misleading (Op., R. 1239).

The Item was their second choice, three testified that budget limitations limited the amount of advertising they could place, two testified that they would place advertising in The Item but for the unit rate, and at least three increased their lineage or commenced advertising in the States involuntarily (Op., R. 1239). The court found that following the adoption of the unit rate "many classified advertisers" have been required to purchase space in the States which they did not want and that some of these advertisers would have placed advertising in The Item but for the unit rate (Fdg. 22, R. 1257). Without conceding that the facts found are significant, we submit that the minute amount of evidence offered by the Government is insufficient to justify the sweeping conclusory finding of the court below. Furthermore, as demonstrated *infra*, pp. 52-61, the rate structure of the Publishing Company imposed no unreasonable restraint on either advertisers or The Item.

There was absolutely no evidence that the unit combination rate for classified advertising had the slightest effect in restricting the sale of any advertiser's products, much less that it in any manner interfered with the free flow of commerce.

The undisputed evidence is that besides being an accepted and well established practice in the newspaper industry, the unit combination rate is sound from a business standpoint. The running of a two-line, three-line or four-line classified advertisement in one daily publication and not in the other results in additional handling costs and less efficient operation. To handle a single classified advertisement some thirty different operations are required (Ex. D-21, R. 1071, 1642A). About 400 classified advertisements appear on a page of classified advertising. There are about six and a fraction pages

of classified advertising running in each morning and evening issue, totaling about 2500 classified advertisements in each. (R. 694, 1130.)[13] The unit rate enables the Publishing Company to simplify its computation of rates, improve its public relations, increase its operating efficiency, and furnish better service to its advertisers (R. 1127-1129). The purpose of adopting the unit rate was not simply to increase the lineage of the States, but was to better the condition of the Publishing Company as a whole, make possible better service to advertisers, and increase the operating efficiency of the company.

2. General Advertising.

From 1933, when the Publishing Company acquired the States, until 1950 general (national) advertising space in The Times-Picayune (morning) and the States (evening) was sold separately although an optional combination rate was in effect which offered advertisers using both publications for the same advertisement a lower rate than the sum of the individual rates for each publication. (Exs. G-20, G-21, R. 48, 242, 1308-1309; Fdg. 23, R. 1257.) Effective June 1, 1949, the Publishing Company also offered a volume discount on general advertising but in order to obtain such a discount on general advertising in excess of 10,000 lines advertisers were required to purchase space morning and evening, morning and Sunday, evening and Sunday or Sunday alone. No such discount could be obtained on space purchased in The Times-Picayune (morning) or the States (evening) separately. A three-day period between the insertion of the first advertisement and the second was permitted. (Fdg. 24, R. 1257; Ex. G-22, R. 48, 1311; R. 57-63, 249-251, 463.)

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[13] About 5,000 advertisements appear in the Sunday publication. (R. 694; 1130.)

In 1949 a new rate card, effective February 1, 1950, was issued. The unit combination rate was applied to all brackets and general advertisers were permitted to advertise in combinations of morning and evening, morning and Sunday and evening and Sunday, or Sunday alone.[14] All existing contracts were carried to completion and there was no increase in rates at that time. (Fdg. 25, R. 1257-1258; Exs. G-33, G-34, R. 77, 1339-1341; R. 1112-1113, 252, 255-257.)

The Government's evidence with respect to the alleged restraint imposed by the general advertising rates related solely to the unit combination rate which became effective in 1950 and no evidence was introduced with respect to the optional combination contracts.

At the time the unit combination rate was adopted between 150 and 200 newspaper publishers had such a rate structure in effect (Fdg. 26, R. 1258). Prior to February, 1950, the Publishing Company was almost unique among newspaper publishers with morning and evening issues in having an optional rather than a unit rate for general advertising (Ex. G-154, R. 1212, 1569-1574; R. 146, 445-446, 474-477). For more than forty years the unit rate has been an accepted trade practice (R. 114, 333-334).

The court below found that the unit combination rate on general advertising resulted in an increase of more than 30% in 1950 over 1949 in such lineage in the States; that during the four years preceding the introduction of the unit rate The Times-Picayune carried in

[14] Advertising contracts are merely billing arrangements between the advertisers and the Publishing Company. There is no obligation or necessity on the part of the advertiser or the Publishing Company to publish any specific amount of lineage but as to the lineage published the rates and conditions shown on the so-called contracts apply. (R. 683.)

excess of 50% more general advertising than the States or The Item; that following the establishment of the unit rate general advertising in the States rose sharply;[15] that within several months the lineage of the States equalled that of The Times-Picayune; and that the States secured a commanding lead over The Item in general advertising after the unit rate became effective (Fdg. 28, R. 1258-1259).

This finding is apparently based upon Exhibits G-107A and B (R. 515, 1449-1450) which purport to show the total daily general advertising lineage carried each month by The Times-Picayune, the States, and The Item from 1946 to 1950, inclusive. The exhibits show that after the adoption of the unit rate in 1950, the lineage in the States and The Times-Picayune became equalized, as necessarily follows from the fact that general advertising space was sold in The Times-Picayune and the States as a unit only.

The Item showed a gain in general advertising in 1950 over 1949, and in fact in 1950 had its best year on general advertising in its entire history (Ex. G-108B, R. 519, 1452; Ex. D-16, R. 948, 1641; R. 964-965). This gain does not take into account that commencing in March, 1950, and continuing until December, 1950, when it went on a five-day and weekend schedule, The Item published a Sunday edition in addition to its six-day daily edition. The Sunday edition undoubtedly drained some of the general advertising lineage from the daily edition (R. 280-281, 331, 335, 348, 392-393, 418, 425, 1115-1119). Furthermore it should be noted that this is purely a statistical analysis of the situation and

[15] Actually, the States carried a monthly average of 161,244 lines of general advertising in 1949 and 212,566 in 1950 (Ex. G-107B, R. 515, 1450).

does not take into account any such factors as the internal policies and management of The Item, any increase in rates made by The Item, or any losses of general advertising to other media, such as radio, television and magazines—all factors which might contribute to The Item's failure to keep pace with the States.[16]

The court below also found that national advertising expenditures are budgeted and only a limited amount is placed in newspapers in any one city; that a great number of advertisers use only one morning and one evening newspaper and some advertisers completely abandoned use of the daily Item, while others reduced their lineage in that newspaper, as a result of the unit combination rate on general advertising; that some advertisers increased their general advertising lineage in the States, or added the States to their schedule involuntarily as a result of the unit rate; and that some advertisers bought space in the States which they would not have purchased in either evening newspaper, while others bought space in the States which they would have purchased in The Item absent the unit combination rate. (Fdg. 29, R. 1258-1259.)

In all, seventeen witnesses testified with respect to the effect that the unit rate had on their purchases of advertising space in New Orleans newspapers. Out of some three thousand advertising agencies in the United States (R. 115-116) the Government selected fourteen space buyers to testify, and out of the many thousands of advertising accounts three advertisers were called.

No contention is made that all of these witnesses

[16] Even the court below conceded in its opinion that it is impossible to conclude what portion of the increased lineage in the States would have gone to The Item absent the unit combination rate (Op., R. 1242).

were pleased with the Publishing Company's adoption of the unit combination rate. As Mr. Kelley predicted in his letter of November 26, 1949, to the branch offices of Jann & Kelley, defendants' national advertising representative, a relatively few accounts did question this rate structure (Ex. G-45, R. 93, 1355-1357). Actually the Publishing Company received six letters and a few telephone calls, all of which were more in the nature of inquiries than complaints (R. 106-108, 115-116). The Government conceded that three of its own witnesses testified that the unit rate had no effect whatsoever on their daily newspaper advertising in New Orleans.[17]

To what extent the unit rate affected the space buying done by other witnesses is questionable. Some had used both the States and The Times-Picayune prior to the adoption of the unit rate.[18] Others testified that the effect of the unit rate was to add the States to those accounts then using only The Times-Picayune but this did not otherwise materially affect the placing of advertising in New Orleans.[19]

None of the Government's witnesses indicated that there was the slightest prejudice to their clients as the result of the Publishing Company instituting the unit rate. Not one word of testimony shows that the products so advertised sold less well or were likely to sell less well as a result of using the States in addition to The Times-Picayune or in place of The Item. The fact is that the placing of advertising is largely a matter

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[17] Philpott (R. 271-273); Kelleher (R. 344-346); Donovan (R. 409). Government brief in court below, p. 23.

[18] McGinnis (R. 386-387); Pumpian (R. 379-384); Harris (R. 366-371); Johnson (R. 354-365, 372-378).

[19] Porter (R. 279-280); Klein (R. 405); Scandlin (R. 400-401); Freifield (R. 282-296); Short (R. 333); Erath (R. 392-393); Hicks (R. 422); Marcuse (R. 425); Margules (R. 323-324); Einstein (R. 299-300).

of individual discretion and space-buying habits differ among agencies and among advertisers (R. 325). The fundamental fact remains that each advertiser is free in every sense of the word to use The Item exclusively or in conjunction with defendants' publication in whatever proportion he sees fit.

The court below found that the intention of the defendants in adopting the unit combination rate on general (as well as on classified) advertising was to restrain advertisers from making an untrammeled choice between the States and The Item in purchasing advertising space and also to substantially diminish the competitive vigor of The Item. (Fdg. 31, R. 1259.)[20]

Any fair reading of the testimony clearly demonstrates that the Publishing Company established the unit rate for the purpose of increasing the revenues of the Publishing Company as a whole (R. 67-71, 76, 224-225). Discussion concerning the merits of adopting the unit rate on general advertising had been going on for many years following the acquisition of the States (R. 67-68, 87). Rising costs of newsprint and other supplies, labor, overhead, etc., compelled a constant search for additional revenue (R. 224-225, 475). The ultimate decision to adopt it was made at a meeting in New Orleans in June, 1949 (R. 88). In the final analysis it was a question

[20] This finding has no support in the evidence. The Government referred only to a memorandum prepared by Mr. V. J. Kelley, defendant's national advertising representative, and sent to his various branch offices. (Ex. G-45, R. 93, 1355-1357.) The memorandum states that it was anticipated that a relatively few accounts might object to the adoption of the unit combination rate on general advertising, and that the rate structure ought to eliminate to a great extent "the deleterious selling on the part of our evening contemporary [The Item], which, in the long run, is not to the best interests of the manufacturer." Mr. Kelley explained that The Item was not considered at the time the unit rate was adopted, only the affairs of the Publishing Company. By "deleterious selling" he had reference to the means by which established schedules were pulled out of newspaper advertising and placed in other media (R. 93-96).

of adopting the unit rate or raising all rates for general advertising (R. 475).

Furthermore, the Publishing Company was faced with the problem of evolving a rate structure which would enable it to hold its own in a highly competitive market. In the sale of general advertising space the newspapers in New Orleans are in vigorous competition with other advertising media such as magazines, radio, television and billboards as well as with newspapers all over the country. (Fdg. 27, R. 1258; R. 86-87, 254-255, 325, 361, 446-448, 598.) The promulgation of the unit combination rate structure on general advertising merely constituted an attempt on its part to offer attractive rates to obtain new and retain old advertising accounts. Defendants' milline rates (the cost of an agate line of advertising printed in a million newspaper copies) determine to a large extent the amount of general advertising they will be able to attract. Frequently those markets in which publishers have high milline rates are allotted smaller advertising schedules or no newspaper advertising schedules whatsoever by general advertisers for that very reason. (R. 253-254, 289, 331-332.)[21]

In view of the necessity for the Publishing Company to obtain additional revenue to meet rising costs and the obvious desirability of developing a rate structure which would meet the competitive situation, it certainly was not unreasonable for defendants to decide that the unit rate would best serve the interests of the Publishing Company

[21] The milline rates of the Publishing Company currently graduate from $2.14 on the open schedule down to $1.96 on volume (R. 296, 1115). The milline rates of The Item graduate from $2.96 to $2.58 on volume (R. 1115). Other competitive rates which the Publishing Company must meet include the New York Daily News' milline rate of $1.18 and the Louisville Courier-Journal rate of $1.83 (R. 253-254).

and the advertiser.

3. Retail Display Advertising.

Since 1935, the Publishing Company's retail display contracts have offered advertisers the opportunity to obtain a volume discount in one daily publication based upon the lineage contracted for in the other. Thus, an advertiser contracting for lineage in The Times-Picayune will be billed for additional advertising space taken in the States at rates based upon the amount of lineage contracted for in The Times-Picayune. Conversely, an advertiser contracting for lineage in the States may run advertising in The Times-Picayune at rates based upon the amount of lineage contracted for in the States plus one cent per line. This rate structure merely gives the advertiser the advantage of a volume discount in both publications if he has contracted for it in one or the other. (Fdg. 32, R. 1259; Ex. G-92, R. 189, 1408-1409; R. 230-234, 237-239, 241-242.)

No testimony was adduced with respect to any effect which this rate structure had in New Orleans or elsewhere. While the court concluded that the effect of the rate structure was to draw some advertising from The Item to the States (Fdg. 32, R. 1259) there was no evidence to this effect and the finding rests solely on conjecture. The trial court did not hold that the rate structure was in any way illegal.

D.

The Attempt to Monopolize.

The government contended that the defendants have attempted to monopolize interstate trade and commerce in newspapers and in the dissemination of news and advertising as shown by (1) their purchase of the States in

1933; (2) their adoption of the unit rate for classified advertising in 1935; (3) their operation of the States (evening) at a loss since 1948 while making profits from publication of The Times-Picayune (morning) and The Times-Picayune-New Orleans States (Sunday); (4) their adoption of the unit rate on general advertising in 1950; and (5) their interference with the distribution of The Item in 1949-1950 (Op., R. 1250).[22]

The court below held that the purchase of the States in 1933 was not a part of a course of conduct which had as its purpose an attempt to monopolize (Fdg. 9, R. 1254); that the Publishing Company at no time operated the States at a financial loss (Fdg. 10, R. 1254); and that the circulation practices of the Publishing Company were no part of any plan to injure or restrain a competitor (Fdg. 11, R. 1254). However, the court concluded as a matter of law that the Publishing Company had attempted to monopolize in violation of Section 2 of the Sherman Act (Concl. 5, R. 1262) and that the defendants Nicholson, Tims and Murray had violated Section 2 of the Act by forming and effectuating on behalf of the Publishing Company the unit rate contracts for classified and general advertising (Concl. 6, R. 1262). The reasoning of the court in arriving at these conclusions is made clear from the following statement contained in the opinion (Op., R. 1251):

> "Defendants, other than Coleman, by the use of the unit rate device, attempted to monopolize that segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also require morning newspaper space and who could not because of

[22] These were the points which the Government urged after all of the evidence had been received. Several other contentions were abandoned (Complaint, pars. 23(b), (d), (e), (h)(3), R. 6-8).

budgetary limitations or financial inability purchase space in both afternoon newspapers * * *"

From the foregoing quotation it is plain that the court's conclusion that there was an attempt to monopolize depends upon acceptance of the artificial concept that there is an "afternoon newspaper general and classified advertising field" as distinguished from a morning field and that there may be monopolization of that segment of the afternoon field consisting of those advertisers who spend their money with one publishing company and have none left to spend with competitors. Assuming *arguendo* that there may be some legal basis for the theory adopted by the court, there is no necessity to repeat the facts with respect to the classified and general advertising contracts which have been detailed *supra*, pp. 11-21. The application of those facts to the alleged attempt to monopolize is discussed *infra*, pp. 75-91.

For present purposes it is only necessary to point out that the entire history of the Publishing Company refutes the idea that the defendants by adopting the unit rate on classified advertising in 1935 and the unit rate for general advertising in 1950 were engaging in an attempt to monopolize. Thus, in 1941 and in 1949 when the Publishing Company was offered opportunities to purchase The Item each time the offer was declined, the president of the Publishing Company, L. K. Nicholson, stating that he did not want a monopoly but preferred a competitor. (R. 590, 610.) [23] Further, throughout the years the Publishing Company has continuously cooperated with The Item in such ways as the exchange of advertising mats, which has been more beneficial to The Item than the Publishing Company (R. 1157-1159),

[23] These facts were proved by the Government's own witnesses.

permitted The Item to use the lobby of its building without charge as a newspaper distribution point (R. 1143), and furnished The Item with newsprint when its supplies became depleted (R. 1158). This is not the behavior of men engaged in an attempt to monopolize and we submit that the record is not only devoid of any evidence of intent on the part of the defendants to commit that offense but specifically refutes the existence of any such intent.

The undisputed evidence establishes that at the present time The Item is in a healthier position than at any time in its entire history. Its circulation, which is greater than that of the States, is at an all-time high, having increased by 5,000 during 1950 when the Publishing Company's unit rate on general advertising was in effect (Fdg. 34, R. 1260; Ex. G-148, R. 993, 1535-1549). During that same year general advertising lineage in The Item increased by 682,458 lines, and its total advertising increased by 3,000,000 lines.[24] In 1949 The Item carried 23.36% of the total general newspaper advertising lineage in New Orleans and in 1950 it carried 26.43% of the total (Ex. G-108B, R. 519, 1452; Ex. D-16, R. 948, 1641). In 1950, 52.8% of all national advertisers who placed newspaper advertising in what the Government has referred to as the "afternoon field" in New Orleans used The Item, and this amounted to 42% of the general advertising lineage so placed (Ex. G-108B, R. 519, 1452; Ex. G-110B, R. 528, 1456). For years The Item has carried more than twice as much retail display advertising as the States.[25] The revenues

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[24] This includes lineage in The Sunday Item which was published from March to December, 1950 (Ex. G-108B, R. 519, 1452; Ex. D-16, R. 948, 1641; R. 964-965, 1224-1225).

[25] This was conceded by the Government in its trial brief in the court below, p. 25.

of The Item during 1950 from both circulation and advertising were greater than ever before in its history (R. 964-965, 1224-1225).

Between 1941 and 1949 the market value of the common stock of The Item Company increased from $400,000.00 to $1,000,000.00 and for the fiscal years 1943-1949 The Item Company had net profits before taxes averaging over $200,000.00 a year (R. 609). In the circumstances it seems patent that there was absolutely no probability that The Item would be driven from the field, or would lose its share of the market, or that the Publishing Company would monopolize the field.

THE DECREE

A.

The Decree Entered By The Trial Court.

In so far as now material the court below enjoined the Publishing Company, its officers, agents and employees, from (Decree Sec. V, R. 1264-1265):

> "A. Offering to sell, contracting to sell, or selling advertising space in any newspaper published by it only upon the condition, expressed or implied, that the purchaser of such space will contract for or purchase advertising space in any other newspaper published by it.
>
> B. Refusing to contract to sell or refusing to sell advertising space separately in each newspaper published by said defendant.
>
> C. Using the dominant position of the defendant, The Times-Picayune Publishing Company, in the morning field, to sell any newspaper advertising at rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper

advertising rates in New Orleans;"

The court retained jurisdiction to amend, modify and enforce the judgment. (Decree, Sec. VIII, R. 1266.) It also provided that the initial rates promulgated by the Publishing Company under the decree are to be submitted to it for approval (Decree, Sec. VI, R. 1265) and the Department of Justice is given wide visitorial power (Decree, Sec. VII, R. 1265-1266).

B.

The Government's Proposed Decree.

The Government has appealed solely on the ground that the court erred in failing to enter Sections V-C and V-D of the Government's proposed decree. These sections sought to enjoin the Publishing Company from (R. 1275-1276):

> "V-C. Entering into, adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in any single newspaper where such space is not sold in combination with advertising space in any other newspaper published by the defendants or any of them, the rate for which is based upon or determined by the volume of advertising space to be purchased or purchased in any other newspaper published by the defendants or any of them.
>
> V-D. Entering into, adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in more than one newspaper published by the defendants or any of them, the combined rate for which is:
>
> 1. During a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of ad-

vertising space when purchased separately in each of the newspapers published by defendants or any of them which is included in the combined rate, or

2. After a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by the defendants or any of them which is included in the combined rate, minus such amount as the defendants or any of them can show represents savings in costs to the publisher or publishers resulting from the production and sale of such advertising in combination."

SPECIFICATION OF ERRORS TO BE URGED

The court erred:

1. In holding that the general and classified advertising contracts of the Publishing Company imposing compulsory unit rates have been and now are in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act.

2. In holding that the defendants (except the defendant Coleman) have violated and are now violating Section 2 of the Sherman Act by engaging in an attempt to monopolize a part of trade and commerce.

3. In enjoining and restraining the Publishing Company, its officers and agents, from selling only at a unit rate and refusing to sell separately advertising space in The Times-Picayune (morning) and the New Orleans States (evening).

4. In enjoining the Publishing Company, its officers and agents, from using its "dominant position * * * in the morning field" to sell any newspaper advertising at

rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans.

5. In finding that The Times-Picayune is the "dominant newspaper" of New Orleans for the purposes of the Sherman Act.

6. In failing to give sufficient consideration to the entire newspaper field in New Orleans as distinguished from the so-called evening newspaper field and to the other advertising media available to an advertiser aside from newspaper advertising.

7. In failing to consider the lack of any dangerous probability of monopoly or monopolization.

8. In failing to consider that the Publishing Company is a single entity engaged solely in the newspaper publishing business and as such is entitled to exercise its own business judgment as to the manner and quantity in which its service will be sold.

9. In holding that the intention of the defendants (except the defendant Coleman) in adopting the unit combination rates on general and classified advertising was to restrain general and classified advertisers and to substantially diminish the vigor of a competitor.

10. In fixing newspaper advertising rates by court decree in violation of "Freedom of the Press" provisions of the First Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

I.

Insofar as is relevant to the issues in this case, the Publishing Company is a single integrated business en-

terprise engaged in selling to advertisers its total daily circulation as a unit. This case has nothing to do with that phase of the newspaper publishing business which consists of selling news and entertainment to readers. Such is simply the device by which the Publishing Company acquires a sufficient volume of readers to interest advertisers in buying space in which to advertise their wares and thus bring them to the attention of potential customers.

In order to attract readers the Publishing Company publishes daily a so-called morning issue, The Times-Picayune, in five press runs between 6:36 P. M. and 12:31 A. M., and a so-called evening issue, the New Orleans States, in six runs between 8:50 A. M. and 3:37 P. M. That the two issues have different news, editorials and features, have a distinctive make up and appearance and may be thought of by readers as two newspapers, is of no significance to advertisers, who are simply seeking to attract the attention of the maximum number of potential customers at the lowest possible cost.

All that the Publishing Company is selling the advertiser is its harvest of readers, whether gleaned by publishing in more than one press run, or by publishing in more than one issue. As a single trader, the Company is entitled to determine in the exercise of its own business judgment whether to offer the entire crop as a unit or offer it in segments. It is not for the Publishing Company's customers, the advertisers, to complain that they are not accorded the privilege of selecting the quantity of readers they desire to buy. Certainly, the Sherman Act does not impose upon the Publishing Company the duty to grant that privilege.

II.

Even if we assume, *arguendo*, that the sale of advertising in morning and evening combination could constitute a tying agreement, the contracts here involved did not involve any unreasonable restraint of trade and commerce.

In striking down the unit rate contracts, the Court below ignored the significant criteria of reasonableness long recognized by this Court. There can be no question but that the unit rates were instituted by the Publishing Company for sound business reasons. The practice had been recognized in the industry for over forty years and, at the time the Publishing Company adopted it, substantially every publisher having morning and evening issues was following that practice. In adopting the practice the Publishing Company was able to obtain additional revenues, achieve greater efficiency, and offer better service to advertisers at a lower over-all cost to the advertisers. Furthermore, the adoption of the practice was essential to enable the Publishing Company to meet not only local newspaper competition but the competition of newspapers elsewhere as well as the competition of other advertising media such as radio, television, magazines, billboards, etc. We submit that all of these facts, though given no weight by the Court below, amply demonstrate that the Publishing Company's action was entirely reasonable unless there was overwhelming evidence that the practice was detrimental to the free flow of trade and commerce.

The evidence completely fails to demonstrate any adverse effect on advertisers. The lower Court felt that a restraint was imposed because advertisers have budget limitations and would, if they remained within those

limitations, be unable to spend money with the Publishing Company's competitors if they used their entire budget to purchase advertising space from the Publishing Company. There was no real restraint of trade. Budget limitations are merely self-imposed restrictions, and every advertiser is always free to reallocate his purchases of space to divide those purchases between the Publishing Company and its competitor, The Item, or to devote his entire budget to one or the other. Furthermore, no restraint in the legal sense could have been imposed by depriving advertisers of an "untrammeled freedom of choice" in selecting a newspaper advertising medium. Certainly, the right of an advertiser to exercise his mere whim or fancy in selecting an advertising medium does not counter-balance the right of the Publishing Company to protect its legitimate business interests.

Since this case turns on whether the advertising contracts imposed a restraint on trade and commerce, it follows that if no restraints were imposed on the advertiser there could not have been any restraint on the Publishing Company's competitor, The Item, because advertisers were not restrained from availing themselves of the services of The Item. Furthermore, the evidence affirmatively demonstrates that over the years The Item has steadily grown in circulation, lineage, revenues and value of capital investment.

While there is no case precisely in point, the practice of using combination advertising rates was sustained in *Prairie Farmer Pub. Co. v. Indiana Farmer's Guide Pub. Co.*, 88 F. 2d 979 (C.A. 7, 1937), cert. den. 301 U.S. 696, despite the proven adverse effect on the particular competitor there complaining. The decisions of this Court such as *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920), which follow the rationale of *United States v.*

Colgate & Company, 250 U.S. 300 (1919), affirm the right of the Publishing Company as a single trader to institute unit rates for advertising in its entire circulation. Since the Publishing Company has no patent, copyright, or other form of monopolistic control, the cases relied upon by the Government relating to tying the sale of unpatented articles to patented articles or refusing to license one copyright except on the condition of accepting another copyright are not in point.

III.

The Court below erred in holding that the institution of the unit rates for classified advertising in 1935 and the institution of unit rates for general advertising in 1950 constituted an attempt to monopolize. The Court ignored the decision in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), and reached its conclusion by arbitrarily circumscribing the market within such narrow limits as to make it logically impossible for the Publishing Company to escape the charge of monopolizing. The Court completely ignored the question of whether there was any dangerous probability that the defendants could monopolize and, as a matter of fact, the record completely refutes the notion that there could have been any such probability whatsoever. Finally, the Court misconstrued the applicable decisions with respect to the necessity of proving intent as an element in establishing an attempt to monopolize and based its ruling on an inferred intent despite the fact that the record affirmatively establishes a complete absence of specific intent.

IV.

Even if we assume that the decision of the lower Court was correct, it was an abuse of discretion for the

Court to include in the decree a provision perpetually enjoining the Publishing Company from promulgating rates lower than an arbitrary and unworkable standard fixed by judicial fiat. Such a provision is an intolerable and unnecessary interference with the prerogative of management to exercise business judgment in meeting fluctuating economic conditions. By thus arrogating to itself the right to regulate advertising revenues, which constitute the life blood of any newspaper, the Court actually seized the power to regulate and control the newspaper. The record in this case in no way justifies such drastic relief.

The additional injunctive provisions sought by the Government are primarily punitive and seek to expand the Court's regulation and control over the operations of the newspaper. At no time did the proof indicate, or the Court intimate, that the defendants have shown any proclivity to unlawful activity. Under the circumstances the Government's efforts to obtain additional relief are entirely unwarranted.

ARGUMENT

I.

The Publishing Company Is a Single Business Enterprise: the Sale to Advertisers of Its Entire Daily Circulation as a Unit Is Not in Fact or in Law a "Tie-in" Sale.

This case is concerned solely with the problem of whether a single newspaper publisher can be held to have violated the Sherman Act because he sells advertising space in the morning and evening issues of his newspaper to certain classes of advertisers as a unit and refuses to sell such space separately. In selling space

to advertisers the publisher does nothing more than offer a medium by which those who produce or sell goods may attract the attention of the public to their wares. Insofar as the advertiser is concerned his only interest is in bringing his wares to the attention of potential customers.

Broadly stated the Government's position is that where a publisher publishes morning and evening issues having distinctive physical characteristics he is producing two separate and distinct products which cannot be sold to advertisers as a unit only. The Government, in short, argues that the selling of readers as a unit to advertisers is analogous to the "tie-in" sale of two separate and distinct products by a single manufacturer or trader.

The arguments of the Government and the opinion of the court below both rest squarely upon this fallacious premise. The crux of the court's opinion is found in the following statement (Op., R. 1245):

> "* * * Publishing, as it does, two separate and distinct newspapers, the defendant corporation's general and classified advertising contracts which compel an advertiser in one of its newspapers to contract for an equal amount of space in its other newspaper, effect tying-in sales * * *."

The basic position of the defendants is that the Publishing Company has the same right to sell to advertisers its entire daily volume of readers on a week day as it has on a Sunday. The Government has not quarrelled with the right of a publisher to sell its Sunday circulation as a unit, nor has the Government objected to unit sale of advertising by an around-the-clock newspaper such as the Washington Times Herald. Nor has there been any com-

plaint about the sale as a unit of advertising in the five different press runs of The Times-Picayune (morning) or the six different press runs of the New Orleans States (evening).

With due deference it is submitted that the Government and the lower court have misconstrued the real nature of a newspaper's business and have not a proper understanding of the distinction between **selling news** to **subscribers** and **selling readers** to **advertisers.** The argument that the morning editions and afternoon editions are separate papers and products, and that there is an illegal "tie-in" agreement, proceeds on the theory that The Times-Picayune Publishing Company requires **subscribers** to take both The Times-Picayune and the States in combination which is not a fact.

In a popular sense the morning Times-Picayune and the afternoon States may be referred to as two papers insofar as **subscribers** are concerned. In the same sense, to a lesser degree, the various press runs of the morning and evening publications of The Times-Picayune Publishing Company are different papers. But insofar as **classified and general advertisers** are concerned, the Publishing Company is not selling different papers or products in any legal, realistic or practical sense. It is selling **readers** or reader coverage to advertisers.

It is elementary that newspapers produce readers in printed pages, and readers in turn produce and induce advertising and revenue. The greater the number of readers a publisher can offer the greater will be the value of the resulting merchandising impressions. This is true whether it merely enlarges the number of press runs in the morning and evening or adds morning and evening

issues. Newspapers must deliver readers for sale in order to obtain advertising revenues. Thus, the real **product** of any newspaper, insofar as advertisers are concerned, is circulation and **readership,** and not the publishing of news, editorials and features. Subscribers are interested in buying news, editorials and features, but advertisers are primarily interested in buying **readers.** The real customer of a newspaper who supplies most of the revenue for its expenses and survival is the advertiser, not the reader. The reader serves to induce advertising, the primary source of revenue. In this fundamental manner newspaper publishing differs from the ordinary business of producing goods. The publisher **produces readers,** and the number of issues he publishes is directly dependent upon the number of **readers** he hopes and believes he can **produce,** since his revenue from advertising sources is contingent upon the volume of readers he has for sale. While the manufacturer of stoves produces stoves in order to sell stoves, the newspaper publisher produces and obtains readers in order to sell advertising. There is obviously no "tie-in" agreement involved when a single newspaper company sells **all** of its readers as a unit to advertisers.

It is clear, therefore, that the fallacy of the Government's entire case results from its misunderstanding and confusion as to the real nature of the newspaper business, and its consequent misapplication of the "tie-in" theory.

Turning to the actual facts, which are undisputed,[26] we find that the Publishing Company is a single trader,

[26] There is conflicting evidence on the question of whether representatives of the Publishing Company have referred to The Times-Picayune and States as one or two newspapers, but calling it one newspaper does not make it only one nor does calling it two make it two. The issues involved in this case are made clear and depend solely on an analysis and proper understanding and appreciation of the facts.

engaged, insofar as the sale of **newspaper advertising** is concerned, in **one business** and the sale of **one "product."**

All income derived from advertising, printing, publication and circulation is received solely by the Publishing Company. All officers and employees rendering service with respect to advertising, printing, publication and circulation are paid solely by the Publishing Company. All newsprint, ink and other supplies are paid for by the Publishing Company, and all other expenses of every nature and character whatsoever, including all taxes, are paid by the Publishing Company. All bank accounts are maintained solely in the name of the Publishing Company and all safe deposit boxes are in its name. The title to all property, real and personal, is solely in the Publishing Company. The name "New Orleans States" is merely a name given by the Publishing Company to its daily evening issue and to the Sunday issue in conjunction with the name "The Times-Picayune." (R. 193, 1017-1018, 1159-1160.)

The morning, evening and Sunday issues of the Publishing Company are printed at and distributed from its building in the City of New Orleans, where it owns, maintains and operates printing presses, linotypes, and all other equipment necessary for the printing and circulation of a modern daily newspaper. (Complaint, par. 3, R. 1-2; Answer, par. 3, R. 10-11; R. 1159). As shown by Exhibits D-7-D-13, incl., virtually every square inch of each floor in the Publishing Company's building is utilized for publication morning, evening and Sunday. (Exs. D-7 to D-13, R. 525; R. 1628-1634; R. 451-453; R. 1154-1157.) The evidence establishes that 71.6% of all of the employees of the Publishing Company work on

the morning, evening and Sunday publications.[27]. Obviously, employees cannot be expected to work around the clock, so there must be some employees working on only one publication.[28]

Defendant Publishing Company, as a single trader, publishes morning, evening and Sunday, having added the evening issue upon the acquisition of the good will of another company in 1933. It did not purchase the physical plant of that company; it did not maintain the separate identity of the two companies.

There is no law prohibiting a corporation that operates its physical plant only half-time from producing the same product on a full-time basis. This is purely a question of economics and business judgment, and such

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[27] The percentage of employees devoting their time to the morning and Sunday issues only, evening and Sunday only, evening only, and Sunday only, may be summarized as follows: 12.6% morning and Sunday; 6.2% Sunday only; 5.7% evening and Sunday; 3.9% evening only (Ex. D-5, R. 525, 1626; R. 1149-1151). The evidence is uncontroverted that 93.4% of the equipment of the Publishing Company is used on all three publications, .008% is used morning and afternoon, .61% is used morning and Sunday, .14% is used afternoon and Sunday, .29% is used evening only, and 5.56% is used Sunday only (Ex. D-6, R. 525, 1627; R. 1151-1154).

[28] The reason for the employment of some personnel (chiefly editorial) who would devote their entire time to the New Orleans States is made apparent when the press times of the morning and evening issues are considered. These are, as shown by Exhibits G-93 and G-94 (R. 223, 1410-1413):

NEW ORLEANS STATES

Press Run	*Press Time*
1st	8:50 A. M.
2nd	9:55 A. M.
3rd	11:43 A. M.
4th	12:08 P. M.
5th	1:44 P. M.
6th	3:37 P. M.

THE TIMES-PICAYUNE

Press Run	*Press Time*
1st	6:36 P. M.
2nd	9:27 P. M.
3rd	10:55 P. M.
4th	11:13 P. M.
5th	12:31 A. M.

a law would be foolishly detrimental to the public interest and a terrific handicap to a single medium of advertising in a highly competitive field. A publisher who publishes only a morning or evening issue may fully utilize his plant by adding a complementary issue and publishing around the clock. Some papers do so without changing substantially their editorial features, using the same around-the-clock name, such as The Boston Globe. Others, offering additional subscriber inducements use different names for the different times of publication and use different editorial features, comics, etc. The Item had two such publications nine years before the defendant company did. Increasing costs of labor, idle machines, fixed overhead and other similar factors make it unprofitable for factories to operate half-time. For these reasons, approximately one hundred and eighty publishers have realized the greater economy of operating all-day with morning and evening banners, rather than operating on a half-time basis.

An examination of the various press times shows that defendants publish under two banners during a twenty-four hour period eleven press runs. (See Fn. 28, *supra*) It could hardly be urged by the Government that defendants must offer each of the eleven press runs separately to advertisers, or that, for example, they must not sell the first and second press runs of The Times-Picayune (morning) in combination to advertisers.[29] The Government has not objected to the publisher of an all-day paper (i.e., a paper put out under the same banner all day long) offering its various editions throughout

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[29] The final press runs of The Item and of the States have green and peach cover pages, respectively. Their appearance and news content differ from earlier press runs. They are sold only through street sales, generally to non-subscribers. Must advertising be, therefore, sold separately in these press runs?

the day to advertisers in combination only. This is a common and accepted practice among all-day papers, so-called, such as The Washington Times-Herald.

Since the same physical plant is utilized for the publishing of morning, evening, and Sunday issues and since the issues are managed in the same manner largely by the same persons, and published with the same machinery and equipment, the evidence again demonstrates the existence of but **one** integrated unit. Other evidence, such as the circulation and distribution features of defendant's business, leads to the same conclusion. In fact, the total production operations of the morning and evening issues are so intermingled and interwoven that it would be a highly arbitrary and capricious decision to attempt to separate them into distinct operations. What has been so fused together, as a matter of wise economic expediency and justification, may not be arbitrarily torn asunder by the Government.

The law requires that competition shall be the rule of our economic system. It permits and encourages risk capital and the expansion of business. It encourages the economies of mass production. If the publisher of a morning newspaper finds his presses empty part of the time, he may enter the "evening field". He is not required to remain stagnant. He has merely added an evening issue to that published in the morning. He has not started another business. He is still one publisher and he now publishes a morning and an evening issue in place of the one issue he previously published; and surely this is doubly true where such a publisher embarks on this increased venture of capital to meet existing competition on an equal basis. Must he cease efficient operation at the peril of his ventured capital risk if his

competitor through poor management or otherwise reverts to part-time production? There are no cases that permit, much less require, the Court arbitrarily to treat and regulate morning and evening issues of a single publisher as separate products.

We have pointed out that the technical difference between an all-day paper, so-called, and defendants' publication is immaterial so far as advertisers are concerned. Certainly, the news disseminated in the various editions changes throughout the day whether or not the banner changes. Hence, there is the same sort of duplication and lack of duplication of readership. The variety of features in the various editions, like the variety of news articles in the various editions, merely serves to attract additional and different subscribers. It is not determinative of the characterization of the publication from the advertisers' standpoint. The banner carried over the paper is as immaterial as the name of the particular press edition of the all-day paper, so-called, or the morning or evening edition of the paper publishing at only that time, whether it be known as the Red Flash edition, Blue Streak edition, or by any other name.

Even if it is assumed, therefore, for the purpose of argument, that the morning editions (Times-Picayune) and the afternoon editions (States) are two separate products, as the Government contends, they are two products only as to **subscribers** for the purpose of the application of the Government's "tie-in" theory. There is no "tie-in" involved, either in a legal or practical sense insofar as general advertisers are concerned because they are buying circulation or readers.

The Government arbitrarily seeks to classify those press runs of the defendant, The Times-Picayune Pub-

lishing Company, between 8:50 a. m. and 3:37 p. m. as one newspaper or separate product, and those press runs between 6:36 p. m. and 12:31 a. m. as another newspaper or separate product, for the purpose of the antitrust laws. The Government's whole case is based on the theory that the unit rate applicable to these so-called two products is a "tie-in" agreement and that a "tie-in" agreement is illegal. If we assume that The Times-Picayune and States are two "products" for the reasons urged by the Government, they are two "products" only from the standpoint of subscribers and the common understanding of the general reading public.

As we have pointed out, advertisers, as distinguished from subscribers and readers, are interested in circulation,—i. e., the total number of readers they are buying. A single newspaper, as a matter of economic self-interest, is anxious to publish as many issues or, as the Government contends, as many separate newspapers as it can with economy and profit; in order to attract and obtain as many subscribers and readers as possible, so that it can then sell at wholesale its real product—this large total of readers—to advertisers. In other words, two or more different papers may be different products insofar as subscribers and readers are concerned, but total subscribers—i. e., circulation—constitute a newspaper's single "product" so far as advertisers are concerned.

Advertisers are not interested in whether the single newspaper publisher publishes one or many issues or, as the Government contends, many different papers. They pay for the total number of readers who may read or see their advertised products. In other words, from the standpoint of a general advertiser who is seeking maximum impressions at minimum cost, the banner of

the composite group of individual press editions is no more material than is the name of the individual press run itself.[30].

The decision of the lower court assumes that, by publishing the only morning edition in New Orleans, The Times-Picayune Publishing Company thereby obtains at least a temporary advantage in connection with advertising of national advertisers in the "morning field". Insofar as the national advertiser is concerned, there is no magic in the time of publication. He is interested in buying reader coverage. Unlike local display where direct merchandising may be involved, the national advertiser is interested in keeping the name of his product before the public; he is not interested in selling a hundred specific dresses over a specific counter at a specific time.

Accordingly, since the defendant is a single trader and there is no "tie-in" agreement involved in this case, because the Publishing Company sells only one thing to advertisers—i. e., circulation—there is no violation of either Section 1 or Section 2 of the Sherman Act, either in law or in fact, as these sections have been consistently interpreted and applied by this Court. See *United States v. Colgate & Company*, 250 U.S. 300 (1919) and cases cited *infra*, pp. 64-66.

Although unnecessary for the purposes of the argument under this heading, it can not be emphasized too strongly that The Times-Picayune Publishing Company, as a single trader, selling its **readers** wholesale, is in competition not only with The Item in obtaining national advertisers, but with other newspapers in other cities and

[30] His object is to keep his nationally advertised *brand name* before the public.

trade areas with circulation and readers to sell. Moreover, newspaper advertising is only one of many media available to the advertiser (R. 94-95). The evidence shows the Publishing Company is also in direct competition with such other media as magazine, radio, television, billboard, handbill, direct mail, and streetcar advertising. The field is a highly competitive one. Many substantial national advertisers do not use newspaper advertising at all and many others select different media in different areas on a highly competitive basis. (R. 332). A low unit cost and a wide distribution or circulation are of the utmost value to a newspaper in competing with other such media of advertising. (R. 332-333). Furthermore, insofar as The Times-Picayune Publishing Company has circulation for its morning, evening, and Sunday issues in parts of Louisiana other than New Orleans, and in the State of Mississippi and elsewhere, it is in substantial competition with newspapers published elsewhere in the states of Louisiana, Mississippi and neighboring states.

The adoption by the Court of the Government's suggestion of interference with the legitimate and economically justifiable rate structure of The Times-Picayune Publishing Company would amount to arbitrary regulation and restriction of one single business in the light of and on the fallacious basis of a so-called isolated temporary situation in a very limited field of its competition. This restriction would only penalize the business which expands its facilities, editions and circulation, and is being run economically and efficiently. It would enable its less efficient competitor, or competitors, through the help and action of the Government, to level down and eliminate this legitimate advantage obtained under the private initiative system, which the Sherman law is

supposed to foster, in order to confer a benefit on a less efficient competing paper without requiring it to take similar risks or make further investments of venture capital by establishing a morning paper or edition. If the Government could possibly succeed in this objective, instead of encouraging competition, as the Sherman law contemplates, it would stifle and suppress it to the very real detriment of the general public.

II.

Even Assuming Arguendo That Defendants' General and Classified Rates Involve Tie-in Sales, the Unit Rate Advertising Contracts of the Publishing Company Are Proper and Lawful, Are Not In Unreasonable Restraint of Trade and Do Not Violate Section I of the Sherman Act.

Although the defendants in this case are engaged in the newspaper publishing business, it is important to recognize that the only issue here involved relates to the manner in which the defendant Publishing Company may sell advertising space. We are in no way concerned with any problems relating to the dissemination of news or the circulation of a newspaper.

More specifically, the Government has charged and the court below has held that in the circumstances of this case the Publishing Company's advertising contracts for classified and general advertising restrain trade because the Publishing Company offers advertisers its entire circulation, which consists of morning and evening issues as a unit and refuses to sell the morning or evening issue separately. The Government took the position that such contracts were illegal *per se* and accordingly sought a

summary judgment to that effect from the court below.[31] Despite the fact that the court below refused to grant a summary judgment and thus held in effect that it was incumbent upon the Government to prove that the contracts were in unreasonable restraint of trade, we submit that the court's final opinion on the merits plainly demonstrates that it was of the view that contracts of this type could not be reasonable under any circumstances and that it was therefore justified in ignoring all evidence relating to the reasonableness or unreasonableness of such contracts.

It is true that the court below gave lip service to the rule of reason. However, its opinion amply demonstrates that it completely misconceived the application of that rule. It quoted from *United States v. Trenton Potteries*, 273 U.S. 392, 397 (1927), to the following effect (Op., R. 1247):

> "* * * Whether this type of restraint is reasonable or not must be judged in part at least, in the light of its effect on competition * * *."

Misconstruing this language the court proceeded in its opinion to state (Op., R. 1248):

> "Thus it will be seen that the effect of the restraint on competition is the important question in determining reasonableness. * * *"

It is significant that nothing other than the effect on competition was considered by the court in this connection. The nature of the practice, its economic justification, its institution to meet existing competition, its

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[31] The Government moved for partial summary judgment declaring the advertising contracts of the defendant Publishing Company illegal *per se*. The question was fully briefed and argued to the court below and the Government's motion was denied (Tr. Motion for Partial Summary Judgment, p. 69).

promotion of efficiency and low cost to the advertisers, the history and universality of the practice itself, its competitive advantages, its overwhelming acceptance by the advertising public, all important factors, were completely ignored by the court below.

If the court below believed, as we believe, that the rule of reason is applicable to cases such as this, then its inquiry into the facts of this case was far too narrow. The true scope of the rule was perhaps best stated by Mr. Justice Brandeis in the opinion of this Court in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) as follows (p. 238):

> " * * * the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts * * * ".

See also *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Sugar Institute v. United States*, 297 U.S. 553 (1936); *Maple Flooring Ass'n. v. United States*, 268 U.S. 563 (1925); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

As pointed out above the court below blindly followed the Government's argument that the only consideration pertinent to this case was the effect of unit rates on customers and competitors and it completely ignored all other relevant considerations. While we deny that the evidence in any way tends to establish that unit rates have ever had an adverse effect on any customer (i.e., advertiser) or upon any competing newspaper publisher, we submit that the Government has completely failed to maintain the burden of proving that unit rates constitute an unreasonable restraint of trade. As a matter of fact, the evidence demonstrates beyond all question that the adoption of the unit rate structure for both classified and general advertising amounted to nothing more than the institution of trade practice long recognized as reasonable and legally permissible in the newspaper industry.

A. *The Unit Rates Were Instituted for Sound Business Reasons and Had No Adverse Effect on Either Customers or Competitors.*

1. There were Sound Business Reasons for the Publishing Company's Adopting the Unit Rate Structure.

Prior to 1933, when the Publishing Company acquired the States, its only local newspaper competitor, The Item Company, was publishing morning and evening issues called the Morning Tribune and The Item, respectively. Beginning in 1924 classified advertising in the Morning Tribune and The Item was sold only as a unit and that practice continued until 1941 when The Item Company ceased publication of the Morning Tribune (Fdg. 20; R. 1256; R. 451, 682). In 1935 the Publishing Company, which was then publishing The Times-Picayune as its morning issue and the States as its eve-

ning issue, instituted the unit rate for classified adve tising to meet the competition of its competitor, T Item. For the following six years from 1935 to 19 the only two daily newspaper publishing companies New Orleans were selling classified advertising at un rates in all of their respective issues. (Ex. G-20, R. 24 1305; R. 451, 682). In doing so they were only follow ing what was then a commonly accepted trade practic for in 1935 when the Publishing Company adopted th unit rate on classified advertising approximately 12 publishers publishing morning and evening issues had similar rate structure (Fdg. 26, R. 1256; R. 445-44 470).

The undisputed evidence establishes that in the cas of a publisher who has morning and evening issues unit rate for classified advertising results in greate efficiency, reduces costs and serves to promote bette customer relations (R. 1127-1129). For example, at th present time each issue put out by the Publishing Com pany contains approximately six and one-half pages c classified advertising with roughly 400 advertisement to the page, a total of approximately 2500 classifie advertisements (R. 694, 1130).[32] A study of the step necessary to handle a single classified advertisemen shows that there are approximately thirty different oper ations involved. (Ex. D-24, R. 1071, 1642A). Inasmuc as these are small advertisements of three or four lines which must be handled at a very low price; it is obviou that costs must be kept at a bare minimum. It need no elaboration to make it plain that a substantial savin can be realized by offering advertising space for classi fied advertising at unit rates in successive issues rathe

[32] There are approximately 5000 classified advertisements in th Sunday edition (R. 694, 1130).

than giving the advertiser an opportunity to pick and choose the time of publication.

It was not until 1950 that the Publishing Company instituted the unit rate for general advertising. By that time approximately 180 publishers, substantially all of the publishers having morning and evening issues, were operating under a similar rate structure (Fdg. 26, R. 1258; R. 146, 445-446, 474-477).[33] Since the acquisition of the States the Publishing Company had considered adopting this practice but had not done so because economic conditions did not necessitate a change in the established practice (R. 67-68). However economic conditions did not remain static. The increase in the cost of newsprint, supplies, labor, overhead, etc., made it imperative that the Publishing Company obtain additional revenues. Over the years advertising rates had been increased. In 1949 the Publishing Company was faced with the problem of either making a further increase in rates or devising a rate structure which would produce additional revenue. (R. 475.) In the belief that at least a partial solution of the problem was possible by instituting the unit rate on general advertising, the Company took that step. In doing so it was primarily concerned with the fact that in present day circumstances it is required to meet the competition of other media of increasing importance such as television and radio as well as established media such as billboards, magazines, direct mail, newspapers serving other market areas, etc. (Fdg. 27, R. 1258; R. 86-87, 254-255, 325, 361, 446-448,

[33] The Government called as a rebuttal witness, Mr. Pepper, for the purpose of showing that in other cities newspapers competing against the unit rate had suspended operation (Exs. G-153—G-154, R. 1212, 1554-1547; R. 1185-1223). Mr. Pepper denied all knowledge as to why any particular newspaper had suspended operation. So far as he knew it might have been because of voluntary merger, destruction of plant, inept management, business conditions, etc. (R. 1214-1215.)

598).[33a]

The institution of the unit rate made it possible the Publishing Company to offer advertisers a more tractive milline rate (R. 253-254). Above all, it is milline rate that is persuasive in the mind of the adv tiser because his primary interest lies in reaching many potential customers as possible (R. 289, 331-33 Furthermore, there is the unquestioned fact that m efficient production can be obtained when the publish is able to reproduce the same advertisement in both morning and evening issue (Ex. D-22, R. 1071, 1644

2. The Unit Rate had no Adverse Effect on Either Customers or Competitors.

At no time did the Government prove or seek prove that the unit rate structure adopted by the Pu lishing Company was adverse to the general public terest. It based its entire case on the alleged impact unit rates on (1) advertisers and (2) the competi publisher of The Item. The court below followed t trail blazed by the Government and directed its attenti entirely to the effect of the unit rate structure on T Item which it believed followed from depriving adv tisers of their "untrammeled freedom of choice" in lecting newspaper advertising media. It gave no co sideration to the effect of the rate structure upon t Publishing Company or the general public. If it proper to consider something less than the general pu lic interest, namely the interest of the specific cla which might have been adversely affected by any pa ticular practice, it is obviously incumbent upon the cou to balance against the interests of that class the interes

[33a] For example *Printers' Ink* for January 30, 1953, p. 32, es mated that during 1952 advertising expenditures for television creased 49.4 percent.

of those benefited by the practice. For the reasons stated above, we submit that the benefits to the Publishing Company and to the vast majority of advertisers more than warranted its decision to adopt the unit rate structure. However, as will be shown, the adverse effect which the court below thought had been imposed upon advertisers as customers of the Publishing Company and upon its competitor, The Item, was purely illusory.

The effect on classified advertisers. The court below found that as a result of the unit rate for classified advertising many classified advertisers were required to purchase space in the States which they did not want and which some of them might otherwise have purchased in The Item. (Fdg. 22, R. 1257). This finding completely ignores the competitive situation which existed at the inception of the unit rate by the Publishing Company. When the Publishing Company purchased the States in 1933 and continued its publication as an evening issue its competitor, The Item Company, was publishing the Morning Tribune (morning) and The Item (evening) and since 1924 had been selling classified advertising as a unit only (Fdg. 20, R. 1256; R. 451, 682). In 1935 the Publishing Company adopted the unit rate for The Times-Picayune and the States and in doing so did no more than establish a rate structure which was precisely the same as that of its competitor. So far as purchasers of classified advertising were concerned this ~~was no new~~ or novel rate structure but exactly the kind of rate structure which they had come to expect from any publishing company which had morning and evening issues (Fdg. 20, R. 1256; R. 445-446, 470). There is not one iota of evidence that any advertiser protested at the time that the unit rate structure was adopted on classified advertising or that any advertiser felt that

any restraint was imposed on him by reason of the Publishing Company's adopting the unit rate.

When this case was tried in 1951, the Government called as witnesses only five classified advertisers and when their testimony is scrutinized the most that can be said for it is that some of them did not like for the Publishing Company to tell them in what volume it would sell advertising space (R. 487-503, 987-990). Viewed realistically, these advertisers wanted to tell the Publishing Company what it should sell them. Some did say that if they spent all of the money that they had available for advertising with the Publishing Company they could not buy space in The Item. However, none suggested that there was any reason why they could not allocate their advertising funds between the Publishing Company and The Item or, if they chose, devote all to The Item.

There was no evidence that unit rates for classified advertising had any effect on the ability of any advertiser to sell his products and there was no evidence that trade and commerce were affected in any other way. It is common knowledge that classified advertisements consist largely of such categories as "Help Wanted", "Lost and Found", "Used Cars For Sale", "Wanted To Rent", etc. Ordinarily, such transactions do not involve interstate commerce.

The effect on general advertisers. By definition general advertisers are those advertising and selling products on a nation-wide basis. When the Publishing Company adopted the unit rate for general advertising it was certainly no novelty to these advertisers. Some 180 publishers constituting practically every publisher

in the country having morning and evening issues had a similar rate structure (Fdg. 26, R. 1258; R. 146, 445-446, 474-477). That this type of rate structure was recognized as usual and customary is best demonstrated by the fact that when the Publishing Company instituted unit rates for general advertising it received only six letters which could possibly be construed as complaints and were actually more in the nature of inquiries (R. 105-106, 257-258). After all, it could not have been a matter of great concern to general advertisers because their real interest lies in reaching the maximum number of potential customers at the lowest possible cost. There is no question but that unit rates provide the lowest rates that the Publishing Company can offer for its total coverage (Ex. D-22, R. 1071, 1644A; R. 1079-1086).

Out of the 3,000 advertising agencies in the United States and the thousands of advertisers, the Government produced fourteen space buyers from advertising agencies and three representatives of advertisers as witnesses in this case. The most that can be said for their testimony is that some of them said that the unit rate caused them to cease purchasing space in The Item, others said that the unit rate caused them to add the States involuntarily to their advertising schedules in New Orleans, while others said that it had not affected their purchases of advertising space.[34] Inasmuch as these witnesses were specially selected and called by the Government, it is doubtful that their testimony gives a representative picture of the over-all effects of the unit rate. In any event, we believe that a court should hesitate to draw general conclusions on the basis of such a small sample.

None of the witnesses testified that the unit rate

[34] See *Supra*, pp. 18-21.

instituted by the Publishing Company resulted in any prejudice to any general advertiser. There was no evidence that the unit rate affected the sale of any advertiser's products or in any other way affected trade and commerce.

The over-all effect on advertisers. In so far as the court below found that a restraint had been imposed upon advertisers, it held that that restraint consisted of either (1) compelling the advertiser to cease using The Item because his advertising budget was insufficient to permit purchasing space from the Publishing Company at unit rates and also buying space in The Item, or (2) depriving the advertiser of an "untrammeled choice" of newspaper media by compelling him to add the States to his schedule involuntarily (Fdgs. 29, 31, R. 1258-1259). The limited budget concept is nothing more than a fine spun theory which has no basis in reality. The concept that advertisers as customers of the Publishing Company, or that customers of any other merchant, are entitled to exercise an "untrammeled choice" as to what they will buy or the quantity in which they will buy suggests a theory of economic freedom which is only commendable for its novelty.

At the trial the Government argued and the court held that some advertisers have limited advertising budgets which will only permit them to advertise in one morning and one evening newspaper. Consequently, the court concluded that the Publishing Company by putting into effect unit rates for its morning and evening issues had restrained these advertisers from using The Item. (Fdg. 29, R. 1258; Op., R. 1241-1242.) The prime fallacy in that theory is that an advertising budget, like any other budget, is a self-imposed limitation. Certainly

no advertiser would have refrained from exceeding his budget to place advertising in The Item if he had felt that it would be economically profitable to do so. In any event, it was never so much as suggested that advertisers were not free to reallocate their budgets and use The Item in conjunction with the Publishing Company's morning and evening issues or use The Item exclusively.

Furthermore, the whole theory depends upon the premise that if an advertiser chooses to spend all of his advertising dollars with the Publishing Company he will have nothing to spend with its competitor. No one can deny the simple logic of that proposition. However, the Publishing Company should not be held responsible for the fact that in such circumstances the advertiser has nothing left over to spend with its competitor. We submit that the concept of restraint resulting from the "limited budget" of customers is sheer theory devised to rationalize a result.

The next charge which the court below leveled against the unit rates was that those rates deprived advertisers of their "untrammeled choice" in selecting a medium for newspaper advertising (Fdgs. 29, 31, R. 1258-1259). This simply means that advertisers were deprived of the opportunity to buy space in either The Times-Picayune or the States and to refuse to buy it in the other. We have never understood that the Sherman Act was designed to assure every man an opportunity to exercise his individual fancy, however whimsical or capricious, in dealing with another. If that is the law, would it not be just as reasonable to assure the Publishing Company an "untrammeled choice" as to the quantity of advertising space its customers should purchase from it?

When the court's theory of a restraint being imposed upon the advertiser is analyzed it is readily apparent that the concept of preventing advertisers from using The Item because their limited budgets are absorbed by the unit rate is fallacious. The only possible imposition on the advertiser is the fact that he is denied an "untrammeled choice". We have yet to hear any reasons which would justify this Court in holding that an advertiser has an inalienable right to exercise his whim or fancy in selecting an advertising medium or that that right more than counter-balances the legitimate interests of the Publishing Company in instituting unit rates to effect reduction of costs, more efficient operation, more effective competition with other advertising media, the avoidance of rate increases and more complete utilization of its physical facilities.

The effect on The Item. In so far as the Government has contended and the court below has found that the unit rates of the Publishing Company resulted in a restraint on its competitor, The Item, that restraint was limited to the theory that The Item has been deprived of the business of those persons who would have purchased advertising space from it but for the unit rates (Fdg. 28, R. 1258). In other words, the alleged restraint on The Item resulted from the restraint which it is claimed the unit rate imposed upon advertisers. If there was no restraint on advertisers it follows that there could not have been any restraint on The Item.

We believe that we have demonstrated that the unit rates imposed no restraint whatsoever on advertisers and consequently it would seem unnecessary to refute the charge that the unit rate operated in such a way as to restrain The Item. However, it is worthwhile to note

that in 1950 The Item was in the healthiest position of its entire history. Its circulation, advertising lineage and revenues were at an all time high (Ex. G-108B, R. 519, 1452; Ex. D-16, R. 948, 1641; Ex. G-148, R. 993, 1535-1549; R. 964-965). The court below conceded that it was impossible to tell how much lineage The Item had lost as a result of the Publishing Company's putting into effect unit rates (Op., R. 1242). It would have been more realistic for the court to have recognized that it is impossible to tell whether the unit rates resulted in an increase or decrease in the advertising lineage of The Item.

It is difficult to believe that anyone would think that the institution of unit rates for classified advertising by the Publishing Company in 1935 constituted any restraint on The Item. The Item Company had been selling classified advertising at unit rates in the Morning Tribune and The Item since 1924 and continued to do so until 1941 when the publication of the Morning Tribune was discontinued (Fdg. 20, R. 1256; R. 451, 682). Surely the Publishing Company imposed no restraint on its competitor when it adopted precisely the same type of rate structure as the competitor had in effect. The mere fact that by doing so the Publishing Company increased the advertising lineage in its evening issue, the States, in 1936 over 1935, is not significant because this represented growth in advertising lineage and not a shift from its competitor.

If the Publishing Company was entitled to promulgate unit rates for classified advertising in 1935 in order to meet competition, it would be anomalous to hold that those unit rates became a restraint upon its competitor when the competitor chose some six years later

to discontinue its morning publication with the result that it no longer had or could have a unit rate. In any event, there was no adverse effect on The Item after the discontinuance of the unit rate. From 1941 to 1949 The Item experienced an increase in classified advertising lineage of nearly 150 percent, substantially in excess of the percentage gain experienced by the Publishing Company during that period (Ex. G-106B, R. 512, 1448). That two or three of the five classified advertisers (R. 487-503, 987-990) called by the Government testified that they would have used The Item but for the unit rate cannot be treated as a factual basis for an adjudication of unreasonable restraint.

In so far as general advertising is concerned the evidence utterly fails to demonstrate that the institution of unit rates for that class of advertising by the Publishing Company in 1950 had any effect whatsoever on The Item. The Item carried more general advertising lineage in 1950, after the institution of the unit rate by the Publishing Company, than it did in 1949 (Ex. G-107B, R. 515, 1450; Ex. D-16, R. 948, 1641; R. 964-965). This was true despite the fact that during 1950 there were three new newspaper media available to general advertisers in New Orelans—This Week Magazine, The American Weekly and The Sunday Item (R. 536-539). In fact, if we consider the total increase of The Item in general advertising lineage, which would include lineage in its Sunday edition, that increase amounted to 47 percent over the lineage carried in 1949 (Ex. G-108B, R. 519, 1452; Ex. D-16, R. 948, 1641; R. 964-965). Obviously it is appropriate to consider the Sunday lineage because to a considerable extent that lineage represented a shift from the daily Item (R. 280-281, 331, 335, 348, 392-393, 418, 425, 1115-1119). From this it is obvious

that no restraint resulted insofar as The Item is concerned.

We recognize that as a result of the unit rates there was an increase in general advertising lineage in the States.[35] However, the fact that The Item also experienced an increase clearly indicates that the increase experienced by the States was growth and not shift of lineage from a competitor. Nevertheless the Government argues that a restraint of trade must be inferred from the fact that the States increased its share of the so-called evening market and The Item failed to maintain the same proportion of the market that it had enjoyed in previous years.[36] If this contention is sound, it is apparent that no competitor may improve his position in any market by bettering his product, or otherwise, without being charged with violating the antitrust laws. Such a result would not only be absurd but it would be in contravention of the antitrust laws, the purpose of which is to preserve freedom of trade and to insure "equality of opportunity" in the business world. *Ramsay Co. v. Bill Posters Assn.*, 260 U.S. 501, 512 (1923); *Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457, 465 (1941). It is apparent that if a competitor may not increase its business after having been urged to compete, then the antitrust laws not only restrict competition but they prohibit it. As Judge Hand said in *United States v. Aluminum Co. of America*, 148 F. 2d. 416, 430 (C.C.A. 2, 1945):

> " * * * The successful competitor, having been urged to compete, must not be turned upon

[35] In 1949 the States (evening) carried a monthly average of 161,244 lines of general advertising and 212,566 in 1950 (Ex. G-107B, R. 515, 1450).

[36] In 1949 the States (evening) occupied 50.8% of the so-called evening market and The Item (evening) 49.2%. In 1950, the States' percentage was 57.9% and The Item's 42.1% (Ex. G-108B, R. 519, 1452).

when he wins." [37]

B. *The Decided Cases Establish that a Single Publisher may Legally Offer Advertising Space At Unit Rates Only.*

The Government freely admits that there is no decided case holding that it is illegal for a publisher having morning and evening issues to offer advertising space in all of its issues at unit rates only. As a matter of fact, this is a common practice in the industry and has been so for over forty years without challenge by the Government (Fdgs. 21; 26, R. 1256-1257, 1258; R. 114, 333-334). In our view the decisions most nearly in point clearly confirm the legality of the practice.

Before discussing the cases, we call the Court's attention to the fact that this case does not involve a situation in which a seller is selling one part of his output by tying that sale to another part of his output which is protected by a patent, copyright or some other type of exclusive control. Neither is there any question of combination in this case because what was done here was done by a single economic unit, the Publishing Company. The only question with which we are faced is the extent to which the Sherman Act regulates the right of a single trader to determine the manner and quantity in which he shall sell his merchandise.

The only case directly involving combination advertising rates is *Prairie Farmers Pub. Co. v. Indiana Far-*

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[37] The same thought is stated by Mr. Justice Douglas in his dissenting opinion in *Standard Oil Company of California v. United States*, 337 U. S. 293, 324 (1949):

> "If the courts are to apply the lash of the antitrust laws to the backs of businessmen to make them compete, we cannot in fairness also apply the lash whenever they hit upon a successful method of competing."

mer's Guide Pub. Co., 88 F. 2d. 979 (C.C.A. 7, 1937), cert. den., 301 U.S. 696 (1937). There the defendants, separate publishers, published seven farm journals which were circulated in eight states and offered combination advertising rates in all publications.[38] In a suit for treble damages by a farm journal competing with one of the defendants the Court of Appeals held that there was not even sufficient evidence of a violation of the antitrust laws to support a jury verdict in favor of the plaintiff. The court said (pp. 983-984):

> "* * * Here, appellants, it seems to us, brought about a situation by agreement amongst themselves whereby in association they could reduce the cost of securing sustenance in the way of advertising in competition to a certain degree with national farm papers. What they sought in that respect was conducive to reduction of cost and to efficiency of operation of their businesses. Unfortunately, appellee was not in position to meet that competition; but that fact, it seems to us, is one of the fortunes of development of industrial practices, and its existence should not stamp with the stigma of illegality the act of appellants. * * *"

The foregoing case involved a combination of publishers offering advertising space in all of their publications as a unit. Although the offer was optional in

[38] While the combination was optional in form, the plaintiff, publisher of an Indiana farm journal, proved that the cost to advertisers of a one-page display in all of the defendants' papers was $4,870, whereas the cost of advertising in all of defendants' papers except the Indiana publication, plaintiff's competitor, was $5,167.20. The cost of advertising in the defendants' papers, other than the Indiana one, and in plaintiff's paper was $5,951.20. Hence, an advertiser would save $1,081.20 per page by selecting defendants' Indiana paper in lieu of plaintiff's. Plaintiff's business decreased from a profit of $72,000 in 1928 and $54,000 in 1929 to a deficit in the three following years, and it claimed a total loss of $146,405. In 1928, the defendants carried 54 percent of the display advertising in farm papers in the area; in 1932, they carried 84 percent. Plaintiff charged a conspiracy to monopolize the farm paper business and a conspiracy to restrain competition.

form, the economic advantages were so attractive that it might as well have been compulsory in so far as any competitor was concerned. In the case at bar there is no combination of competitors but simply a single trader electing to sell classified and general advertising space at unit rates only.

There is no principle more firmly rooted in the traditions embodied in the antitrust laws than that which permits a trader to establish the terms upon which he will conduct his business. This principle includes not only the fixing of prices at which he will sell his products and the persons with whom he will deal, but it embodies all of the principles fundamental to the constitutional right of contracting. As the term "liberty" is used in the Fifth and Fourteenth Amendments to the Federal Constitution, it includes the freedom of a single person or corporation to contract upon the terms he deems most advantageous. *United States v. Colgate & Company*, 250 U.S. 300 (1919); *Federal Trade Commission v. Raymond Bros.-Clark Company*, 263 U.S. 565 (1924).

The decision in the *Colgate* case, *supra*, clearly pointed to the necessary result in *Federal Trade Commission v. Gratz, et al.*, 253 U.S. 421 (1920). There the respondents as sole agents for one company manufacturing steel ties and another company manufacturing jute bagging, both used for wrapping bales of cotton, refused to sell ties and bagging separately and compelled customers to purchase the two in combination only in order to obtain either. Respondents had at least a "dominant" position if not a virtual monopoly in the sale of steel ties in the area but there was much competition in the sale of bagging. This Court in upholding the right of the respondents to sell the ties and

bagging in combination only said (p. 428):

> "Nothing is alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint. All question of monopoly or combination being out of the way, *a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as, ties and bagging.* If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. *United States v. Colgate & Co.*, 250 U.S. 300." (Italics supplied.)

In *Federal Trade Commission v. Sinclair Co.*, 261 U.S. 463 (1923) this Court upheld the right of one engaged in supplying both pumps and gasoline to retailers to require that the retailers use only its gasoline in the pumps which it supplied. In doing so the Court said (pp. 475-476):

> "The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs."

The foregoing cases, as well as the principles announced therein, were completely ignored by the court below despite the fact that they were stressed in both

the brief and oral argument by the defendants. The Government made no particular effort to distinguish these cases but argued that they were no longer the law.[39] Apparently the trial court agreed with the Government and undertook to overrule the decisions of this Court *sub silentio*. Nevertheless, we insist that the decisions in the *Prairie Farmers*, *Gratz* and *Sinclair* cases stand unreversed. Those cases fully support the defendants in the belief that when they instituted the unit rates they were acting within their legal rights. If this Court now or at some future date determines that a different rule of law is applicable, the defendants should not be held responsible for failing to anticipate a change in the climate of judicial opinion.

C. *The Cases Relied Upon by the Government Do Not Sustain Its Contention that Unit Advertising Rates are Unreasonable.*

To support its theory that unit advertising rates are unlawful, the Government relies primarily on the cases holding that it is unlawful *per se* to license one copyright only on condition that the licensee purchase a license under another copyright (e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948)) and the cases holding that it is unlawful *per se* to require as a condition to obtaining a license to use a patented invention that the licensee purchase unpatented articles exclusively from the licensor (e.g., *International Salt Co. v. United States*, 332 U.S. 392 (1947); *United States v. International Business Machines Corp.*, 298 U.S. 131 (1936)). That line of decisions does not have the slightest bearing on the issue in the case at bar.

There is no patent or copyright on the right to

[39] See Transcript of Pretrial Conference Feb. 22, 1951, p. 40.

publish a morning newspaper. The Government sought to supply the deficiency in its analogy by arguing that The Times-Picayune occupies a "dominant position". Defendants concede that The Times-Picayune, having the greatest circulation and advertising lineage of any New Orleans newspaper, is in that sense the dominant newspaper in New Orleans. The history and growth of The Times-Picayune are free from predatory practices and its present situation was obtained as the result of economic operation, efficient management and the investment from time to time of risk capital.

In the sale of advertising space The Times-Picayune Publishing Company has no monopoly in any legal or practical sense. It has no patent or copyright, nor does its advertising service constitute a commodity within the provisions of Section 3 of the Clayton Act. Anyone, including The Item Company, is free in both a legal and practical sense to start another newspaper in New Orleans at any time, as evidenced by the fact that The Item published a morning issue—the Morning Tribune—until 1941 (Fdg. 16, R. 1255-1256). The Publishing Company occupies only a transient and temporary position and no charge of actual monopoly has been made in this case. The position of a dominant firm in an industry is not illegal and has not in the past and should not now be treated as monopolistic.[40]

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[40] In *United States v. Aluminum Company of America*, 91 F. Supp. 333 (D.C. S.D. N.Y., 1950), Judge Knox refused to alter the status of the Aluminum Company despite its dominance in the industry stating (pp. 346, 416):

> "The conclusion is inescapable, from the Columbia Steel decision that the possession of *monopoly power* is something other than the status in a market of a dominant firm. The dominant firm may have neither the *power to exclude competitors, nor the power to fix prices.*
>
> * * * * * * *
>
> * * * Rightly or wrongly, from an economic and social standpoint, big business in many industries is an actuality.

(Continued)

If a general advertiser does not wish to purc
The Times-Picayune and States in combination he
advertise in The Item, other newspapers in other c
or he may utilize billboards, radio and television faci
available, or he may select a local or national maga
to reach his audience. The contracts which advert
have with The Times-Picayune are not exclusive
place no restriction on the advertiser using as many
media as he chooses. Nothing in the instant case
any resemblance to an effort to extend beyond its
limits a privilege or patent granted in derogation o
public policy expressed in the antitrust laws. Th
simply a case in which a single private business e
prise offers a service in free and open competition
others and chooses to exercise its own judgment as t
minimum service which it will make available.

To conclude that the rule of law developed in
patent and copyright cases covers unit advertising
ignores the fundamental principles underlying the
Both the patent privilege and the copyright privileg
statutory grants of limited monopolies. The monop
are granted to the inventor and the artist as a re
for producing a new and novel creation. As sai
Chief Justice Hughes, in *Fox Film Corp. v. Doyal*
U.S. 123, 127 (1932), with respect to the copyright
nopoly:

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40 Continued

and if such enterprises are to be subjected to effective
tition, their trade rivals must be of somewhat comp
strength.

This situation imposes a minimum effective si
any aluminum producer if it be a real contributor
growth of the industry, and be, as well, a lively com
with the producers of other metals. Unless fully persua
as I am not—that a divestiture of Alcoa's properties
take place, I am most reluctant to attempt to tamper ur
sarily with economic and industrial forces from whic
public has reaped substantial benefits, and from which
it can continue to be served, and without detriment,
opinion, to the national welfare." (Italics added.)

> " * * * The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. * * * "

Nevertheless, the monopolies thus granted by statute are in derogation of a public policy well recognized in the common law and the Sherman Act. Since the public, in order to secure the benefits of invention and artistic creation, has specified the extent to which it will permit encroachment on the policy of free competition, the courts have always been zealous to guard against use of the limited monopoly granted to secure a greater reward than that expressly given. The legality of the limited monopoly granted by patent or copyright being dependent upon statutes authorizing such grants, the courts have consistently held that any attempt to acquire greater monopolistic control over trade and commerce than is expressly permitted by the patent and copyright statutes violates the antitrust laws. In such cases the true gist of the offense is the abuse of the monopolistic privilege granted by the statute. *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488 (1942); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

The *Paramount* case, *supra*, upon which the Government apparently places its chief reliance, is an excellent illustration of the fact that the antitrust law applicable to patent and copyright cases is applicable only to such cases. Before the question of abuse of copyright was injected into the block-booking cases, the practice was held to be a reasonable practice which did not restrain trade. *Federal Trade Commission v. Paramount Famous-Lasky Corp.*, 57 F. 2d. 152 (C.C.A. 2, 1932). When the

practice was subsequently attacked in *United States v. Paramount Pictures, Inc., supra*, the Court, upon a complete examination of the facts, condemned the practice because it "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first." 334 U.S. 157.[41] In defining the limits of its decision, the Court said, (p. 159):

> "* * * All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted."

What has been said in regard to the *Paramount* case applies with equal force to the patent cases such as *International Salt Co. v. United States*, 332 U.S. 392 (1947). This was a typical case of an attempt to extend a Government-granted patent monopoly to cover unpatented material. It adds nothing to the long line of earlier cases, such as *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488 (1942), on which it relied (332 U.S., 395-6). In *Transparent Wrap. Corp. v. Stokes & Smith Company*, 329 U.S. 637 (1947), in discussing the philosophy and reason of this rule, the Court said (pp. 640-641):

> "* * * 'the public policy which includes inventions

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[41] That the decision is peculiar to cases involving abuse of a statutory monopolistic privilege is apparent from the opinion of the trial court. It expressly held, 66 F. Supp. 323, 349:

> "It may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of another—that it is as though the owner of ordinary chattels refused to sell a lot to A unless the latter would purchase in a larger quantity than he desired. * * *
>
> Block-booking, when the license of any film is conditioned upon taking of other films, is a system which prevents competitors from bidding for single pictures on their individual merits and adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first. It differs from such a sale of chattels as we have mentioned because it extends a monopoly which the owner of chattels is not assumed to have. * * *"

> within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant'. If such practices were tolerated, ownership of a patent would give the patentee control over unpatented articles which but for the patent he would not possess. * * * Private business would function as its own patent office and impose its own law upon its licensees."

The Government has argued that the language used in the *International Salt* case, *supra*, at p. 396:

> "* * * it is unreasonable, *per se*, to foreclose competitors from any substantial market * * *"

was intended to enunciate a principle of general and all-inclusive application. Its contention is that this principle should be applied broadly to all ordinary commodities and bring every sale involving minimum requirements of any character within the *per se* doctrine, thereby abolishing the rule of reason and the rights of a single trader as well. It is obvious from later decisions, such as *United States v. Columbia Steel Company*, 334 U.S. 495 (1948), and *Standard Oil Company of California v. United States*, 337 U.S. 293 (1949), that this Court had no such intention.[42]

Another line of cases cited by the Government is

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[42] In *United States v. Columbia Steel Company*, 334 U.S. 495 (1948), these same cases were cited by the Government for the purpose of extending the *per se* doctrine to the acquisition by the United States Steel Corporation of the Consolidated Steel Corporation on the ground that such an acquisition automatically "foreclosed" their competitors in the steel industry from competing for the opportunity to supply the Consolidated Steel Corporation with steel. This Court refused to follow the language of those cases to its logical extreme and applied the rule of reason, saying (p. 523):

> "* * * Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*."

the circuit buying cases involving the moving picture industry, all of which were conspiracy cases. In the court below great stress was placed on the broad statement by this Court in *United States v. Griffith*, 334 U.S. 100, 107 (1948), as follows:

> "* * * It is indeed 'unreasonable, *per se*, to foreclose competitors from any substantial market.' *International Salt Co. v. United States*, 332 U.S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States v. Aluminum Co. of America, supra.* It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

In considering the *Griffith* case, as well as the other motion picture cases, we must not forget that this Court had before it the whole background of interlocking relationships between producers and exhibitors, which bound the whole film industry into an almost watertight monopoly. In the *Griffith* case the court was not dealing with a single trader but with three affiliated companies, and the contracts involved related to copyrighted films. Obviously there were many factors in that case which are not present in this case.

It is true that in the *Griffith* case the court at one point used general language which might seem to refer to circumstances much narrower than the case which was then before it for decision, as follows (p. 107):

> "A *man* with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire *exclusive privileges* in a city where he

> has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a *feeble, ineffective weapon where he has only one closed or monopoly town.* But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places." (Italics supplied.)

Although the court in this quotation did use the expression "a man", nevertheless the *Griffith* case did not actually involve a single trader or a single town. It involved a group of affiliated companies. It also involved the acquisition of exclusive privileges. It did not involve a single town but a series of widespread purchasing agreements by which a monopoly of first run and second run pictures were secured in many towns.

The opinion of the Court in that case expressly recognized this by pointing out that the *Griffith* case was substantially the same as the *Crescent Amusement* case, saying (p. 104-5):

> "In *United States v. Crescent Amusement Co.*, 323 U.S. 173, *a group of affiliated exhibitors, such as we have in the present case*, were found to have violated §§ 1 and 2 of the Sherman Act *by the pooling of their buying power* and the negotiation of *master agreements similar to those we have here.*" (Italics supplied.)

Standard Oil Company of California v. United States, 337 U.S. 293 (1949), is inapplicable here. The decision in that case was expressly limited to Section 3 of the Clayton Act, which, as is well known, was passed for the very purpose of reaching at their inception special and limited types of contracts which were not

unreasonable restraints of trade at common law.[43] The Court refused to go further and decide whether the facts involved a violation of the Sherman Act. And even in considering the Clayton Act, which does not apply to newspaper advertising,[44] the Court said (p. 307):

> "And so we could not dispose of this case merely by citing *International Salt Co. v. United States*, 332 U.S. 392."

It is interesting to note also, as bearing upon the Government's attempt to give extreme interpretations to the language of Mr. Justice Jackson in the *International Salt* case and to the language of Mr. Justice Douglas in the *Griffith* case, that both of these Justices (together with the Chief Justice and Mr. Justice Burton) dissented in the *Standard Oil* case, urging that the system of total requirements contracts in that case should have been held lawful.

Finally there is the recent case of *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), which was not argued by the Government but is cited in the opinion of the court below. The case is not in point for it involved a boycott organized by a newspaper against a

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[43] See *United Shoe Machinery Co. v. United States*, 258 U.S. 451 (1922); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), footnote page 522; cf. also *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46 (1948), footnote.

Handler, *Cases on Trade Regulation* (2d ed. 1951), p. 551, says: "The common law rule on exclusive dealing agreements is stated as follows in 2 Restatement, Contracts, § 516 (1932):

> 'The following bargains do not impose unreasonable restraints of trade unless effecting, or forming part of a plan to effect, a monopoly: * * * (e) a bargain to deal exclusively with another.'"

[44] The Federal Trade Commission has taken the position that a sale of advertising space is not a sale of a "commodity" within the meaning of the Robinson-Patman Act. Informal opinion of FTC, 81 Cong. Rec. 8/25/37, CCH Trade Reg. Service, paragraph 2212, 127. See also *Fleetway, Inc. v. Public Service Interstate Transportation Co.*, 72 F. 2d 761 (C.C.A. 3, 1934).

competing radio station and effectuated through a system of exclusive dealing specifically aimed at obtaining "the complete destruction and elimination" of the competing radio station. The *Lorain Journal* case is in no way analagous to the instant case which involves none of the elements found to be present in that case.

For the reasons stated, it is evident that the cases cited by the Government and relied upon by the court below are not in point. Those cases in no way diminish the force of the rule long established by this Court that a single trader not enjoying the protection of a patent, copyright, or monopolistic control may determine in his own sound business judgment the terms and conditions on which he will sell his product. The record in this case amply demonstrates that there were sound business reasons which more than justified the decision of the Publishing Company to adopt the unit rate structure. In the circumstances, we submit that the unit rate contracts are not in restraint of trade and do not violate the Sherman Act.

III.

The Court Below Erred in Holding that the Defendants Attempted to Monopolize Commerce in Violation of Section 2 of the Sherman Act.

In the court below the Government contended, and the court held, that the defendants were guilty of attempting to monopolize commerce in violation of Section 2 of the Sherman Act. It was the Government's position that the defendants' attempt to monopolize consisted of both the attempt to exclude and the actual exclusion of their competitor, The Item, from a substantial part of the market involved in the publication and cir-

culation of newspapers in New Orleans. That intent and effect was said to be shown by, *inter alia*, (1) the defendants' purchase of the competing New Orleans States in 1933, (2) the adoption of the unit rate for classified advertising in 1935, (3) the alleged operation of the States (evening) at a loss since 1948, while making a profit for The Times-Picayune (morning and Sunday), (4) the adoption of the unit rate on general advertising in February, 1950, and (5) the alleged interference with the distribution of the competing newspaper, The Item, in 1949-50. (Op., R. 1250.)[45]

The Government's contentions with respect to three of the matters which it claimed proved an attempt to monopolize on the part of the defendants were flatly rejected by the court below. With respect to the purchase of the States the court said, "The Government has utterly failed to prove that the purchase of the States in 1933 was a part of a course of conduct which had as its purpose an attempt to monopolize" (Op., R. 1250; see also Fdg. 9, R. 1254). As to the alleged operation of the States at a loss the court said, "I find nothing in the evidence which would indicate, much less establish, that the States at any time was operated at a loss" (Op., R. 1245; see also Op., R. 1250; Fdg. 10, R. 1254). Finally, the court said that, "the so-called interference with The Item's news vendors formed no part of an attempt by the defendants to monopolize" (Op., R. 1250; see also Op., R. 1243-1244; Fdg. 11, R. 1254-1255). The

[45] The Government also charged that as part of the attempt to monopolize the defendants had (1) caused the discontinuance of the Sunday Item in 1941, (2) instituted volume discounts for retail display advertising in 1935, (3) instituted optional combination rates with improper discount requirements for general advertising in 1940, and (4) increased the page content of the States at a financial loss in order to attract advertising from the Item (Complaint, pars. 23(b), (d), (e), (h)(3), R. 6-8). Before the end of the trial all of these charges were abandoned.

Government has not challenged the correctness of the court's conclusions on any of these points.

Despite the fact that the court below found that the Government had completely failed to sustain three of the points upon which it relied as proof of the alleged attempt to monopolize, and the Government voluntarily abandoned four other points, the court nevertheless concluded that the defendants had engaged in an attempt to monopolize in violation of Section 2 of the Sherman Act (Concl. 5, R. 1262). The basis for that conclusion is stated in the opinion as follows (Op., R. 1250-1251):

> "I am satisfied that the evidence with respect to the exaction of the unit rate for classified advertising and general advertising, and the effects thereof, establishes a violation of Section 2 of the Act by all of the defendants except the defendant Donald W. Coleman."

As will be demonstrated, the court below arrived at its conclusion by adopting a wholly arbitrary and artificial concept of the true market. Cf. *United States v. Columbia Steel Company*, 334 U.S. 495 (1948). Furthermore, from the opinion as a whole it is perfectly clear that the court based its ruling on two isolated incidents which it found to be violations of Section 1 of the Act, the first being the adoption of a unit rate for classified advertising in 1935 and the second being the adoption of a unit rate for general advertising in 1950. Nothing in the opinion or the findings of the Court indicates that either or both of these incidents created any real probability of monopoly, (cf. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)) or that the defendants had any specific intent to monopolize (*United States v. Columbia Steel Company*, 334 U.S. 495 (1948);

United States v. Aluminum Co. of America, 148 F. 2d. 416, 429 (C.C.A. 2, 1945)). The error into which the district court fell was that it concluded that the defendants, having been found to have restrained commerce in such a way as to take some business from a competitor, were therefore guilty of attempting to monopolize that part of the business in an arbitrarily limited market despite the absence of any specific intent to do so or any dangerous probability of monopolizing.

A. *There Is No Basis for the Arbitrary Definition of an Artificial Market Adopted by the Court Below*

The court below rationalized its conclusion that the defendants had attempted to monopolize in the following language (Op., R. 1251):

> "Defendants * * * by the use of the unit rate device, attempted to monopolize that segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also required morning newspaper space and who could not, because of budgetary limitations or financial inability purchase space in both afternoon newspapers."

All that the foregoing statement purports to say is that defendants attempted to monopolize the business of those advertisers who had to have space in The Times-Picayune and could not afford to buy space in both the States and The Item. In other words, the Publishing Company by putting into effect the unit rate acquired the entire business of every advertiser who having purchased space from the Publishing Company at unit rates had no money available for the purchase of additional space from the competitor, The Item. No one can deny

the logic of that proposition and if that is what Section 2 of the statute is designed to prevent the defendants should have been held to have monopolized and not merely to have attempted to monopolize. Everyone knows that when a customer spends all of the money which he has available for the purchase of a given article with one merchant the customer has no money left to spend with the merchant's competitors.

The fallacy in the proposition laid down by the court is that it is based on invalid premises and fails to take into account the available alternatives. The court assumes that some advertisers have to have The Times-Picayune as an advertising media. It may be true that some advertisers consider it by far the best medium, but no one has suggested that those advertisers would suffer any substantial injury or would have to go out of business if publication of The Times-Picayune was discontinued. Advertising is only an adjunct to selling, not a necessity, and there are many other media of advertising available besides advertising space in either the issues of the Publishing Company or The Item, such as television, radio, magazines, billboards, direct mail, throw-aways, etc. (Fdg. 27, R. 1258; R. 86-87, 254-255, 325, 361, 446-448, 598). In fact, the record shows that there are many large national advertisers who use no newspaper advertising (R. 255, 332).

In the second place, the statement assumes that the amount which an advertiser can spend for the purchase of newspaper space is inexorably fixed by the advertiser's budget. As pointed out *supra*, pp. 56-58, the notion of budget limitation is more theoretical than real. It is a limitation self-imposed by the advertiser. There

is no reason to think that the amount available for advertising would not be increased if economically profitable to do so, and certainly every advertiser is free to reallocate his budget to purchase space exclusively from The Item, exclusively from the Publishing Company or allocate his purchases between the two or among any other advertising media in whatever proportion he sees fit.

To ignore the full scope of the competitive area in which the Publishing Company must operate is to create a wholly fictitious and arbitrary definition of a market. While a defined portion of an industry may be subject to the proscriptions of the antitrust laws (*Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268 (1934)), the segregation of a portion of an entire industry is proper only when it is based upon reasonable and intrinsic geographical or physical distinctions. It is wholly unreasonable to restrict a market or industry artificially when in matter of fact such market or industry is naturally indivisible.

In *United States v. Columbia Steel Company*, 334 U.S. 495 (1948), the Government attempted to enjoin the purchase of all of the assets of the Consolidated Steel Corporation by Columbia Steel Company, a subsidiary of United States Steel, on the grounds that the acquisition would violate Sections 1 and 2 of the Sherman Act. Consolidated, which was a purchaser of plate and structural steel, operated primarily in eleven western states and regularly purchased thirteen percent of the plate and structural steel but only three percent of the total rolled steel products sold in the eleven state area. It purchased less than one-half of one percent of all rolled steel products sold in the national market.

The Government urged that in gauging the impact of the alleged acquisition the market should be narrowly defined both as to product and area. This Court held that the market was not to be measured by the percentage of plate and structural steel consumed by Consolidated but must be measured by the percentage Consolidated consumed of all rolled steel products because any producer of plate and structural steel could easily convert to production of other rolled steel products. Furthermore, as we read the Court's opinion, we think the necessary implication is that the appropriate geographic area to be considered as constituting the market in that case was the entire nation.

In *United States v. Aluminum Co. of America*, 148 F. 2d. 416 (C.C.A. 2, 1945), it was held that the true market consisted of Alcoa's *total* production of ingot, and not merely a portion thereof, the court stating (p. 424):

> "We canno' therefore agree that the computation of the percentage of 'Alcoa's' control over the ingot market should not include the whole of its ingot production."

See also *Patterson v. United States*, 222 Fed. 599, 621 (C.C.A. 6, 1915), cert. den. 238 U.S. 635 (1915); *United States v. Standard Oil Co.*, 173 Fed. 177, 191 (C.C. Mo. 1909), aff'd. 221 U.S. 1 (1911).

In this case the court below ignored the basic principle to be deduced from the decision in the *Columbia Steel* and *Aluminum* cases. It was not satisfied to fix purely arbitrary limits for the market; it defined a market so limited that by the very terms of the definition defendants could not escape monopolizing it. Simply

stated, the court said that defendants had violated the law by monopolizing the business of those customers who, having spent their money with the Publishing Company, had no money left to spend for local newspaper advertising with its competitor. We submit that the proposition is completely untenable and results in an arbitrary and unreasonable application of Section 2 of the Sherman Act.

B. *The Court Below Did Not Find and There Was No Evidence That the Adoption of the Unit Rate Created a Dangerous Probability of Monopoly*

Regardless of the true scope of the market to be considered, it is necessary to prove that the practices complained of created a dangerous probability of monopoly. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Swift and Co. v. United States*, 196 U.S. 375 (1905); *United States v. Aluminum Co. of America*, 148 F. 2d. 416 (C.C.A. 2, 1945). Certainly the court below made no explicit finding that the adoption of the unit rate created a dangerous probability of monopoly. We submit that none of the other facts found by the court suffice to supply the inference that there was such a dangerous probability. Furthermore, the undisputed evidence refutes any argument that such a probability existed.

Certainly at the time the defendants instituted the unit rate there was absolutely no probability that doing so would even tend toward monopoly. When the Publishing Company adopted the unit combination rate for classified advertising in 1935, its only competitor was The Item Company, Ltd., which at that time was pub-

lishing the Morning Tribune as a morning issue and The Item as an evening issue. The Morning Tribune and The Item had had a unit combination rate on classified advertising since 1924 and continued that combination rate in effect until the discontinuance of the Morning Tribune in 1941 (Fdg. 20, R. 1256; R. 451, 682). There is no question but that the defendant Publishing Company adopted the unit rate for its morning and evening issues to meet the competition of a unit combination rate in force on the morning and evening issues of its sole local newspaper competitor. That The Item discontinued publication of the Morning Tribune in 1941 is of no legal significance. We know of no rule of law that would require the Publishing Company to desist from using a unit combination rate because its competitor changed its method of doing business.

From the time that The Item Company stopped publication of the Morning Tribune until the sale of The Item in 1949, The Item was published as a six-day evening paper. During this period the Item increased its classified advertising lineage by nearly 150 percent, which was appreciably in excess of the Publishing Company's percentage gain during that period (R. 558-559).[46] No fair comparison can be made of the situation after 1949 because The Item commenced publication of a Sunday edition which obviously drained some lineage from the daily Item (R. 1115-1119).

In so far as the unit combination rate on general advertising is concerned, it is equally clear from the record that the adoption of that practice by the Publish-

[46] From Ex. G-106B (R. 512, 1448) it may be computed that there was an increase on daily classified advertising lineage of 145% for The Item as compared to 122% for the Publishing Company between 1942 and 1949.

ing Company did not result in damage to The Item. During 1950, when it was competing with the Publishing Company's unit rate, The Item carried 682,458 more lines of general advertising than in 1949, when the Publishing Company had no unit rate.[47] In 1949 The Item carried 23.36 percent of the total general newspaper advertising lineage in New Orleans and in 1950 it carried 26.43 percent of the total (Ex. G-108B, R. 519, 1452; Ex. D-16, R. 948, 1641). In 1950, 52.8 percent of all national advertisers who placed newspaper advertising in what the Government calls the "afternoon field" in New Orleans used The Item and this amounted to 42 percent of the general advertising lineage so placed. (Ex. G-108B, R. 519, 1452; Ex. G-110B, R. 528, 1456). It should be noted also that in 1950 The Item continued to carry twice as much retail display advertising as the States and the circulation of The Item, which has been greater than the States for years, reached an all time high.[48]

Certainly the recent history of The Item gives no indication that there is any likelihood of it being driven from the market. Between 1941 and 1949 the market value of the common stock of The Item Company increased from $400,000 to $1,000,000, and for the fiscal years 1943-1949 The Item had net profits before taxes averaging over $200,000 a year. (R. 609). In 1950 circulation and advertising lineage reached an all time high in The Item, and in fact its total advertising lineage increased by 3,000,000 lines in 1950 over 1949 (R. 1224-1225). Since its rates were also at an all time high, it

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[47] This includes lineage in the Sunday Item which was published from March to December, 1950. (Ex. G-108B, R. 519, 1452; Ex. D-16, R. 948, 1641; R. 964-965, 1224-1225.)

[48] This was conceded by the Government in its trial brief in the court below, p. 25.

follows that gross revenues in 1950 were also the greatest in its history. In the circumstances, we submit that there is not the slightest probability that the Publishing Company is about to obtain a monopoly.

C. *The Court Below Did Not Find and the Evidence Does Not Support Any Contention That the Defendants Had a Specific Intent to Monopolize.*

While we believe that what has been said above completely refutes the charge that the defendants attempted to monopolize, we cannot ignore the fact that the Government utterly failed to prove an essential element of the offense, i.e., specific intent. In the lengthy findings adopted by the district court the only reference to intent is in Finding No. 31 (R. 1259), in which it is stated that the intent of defendants in adopting unit rates on general and classified advertising was "to restrain general and classified advertisers from making an untrammeled choice between the States and The Item in the purchase of advertising space, and also to substantially diminish the competitive vigor of The Item."

To interpret properly the foregoing finding it is necessary to turn to the court's opinion in order to ascertain the kind of intent the court had in mind. The general discussion in the opinion is not illuminating but the law relied upon by the court below with respect to the matter of intent is most illuminating. The court below quotes a passage from *United States v. Aluminum Co. of America*, 148 F. 2d 416, 432 (C.C.A. 2, 1945) which was also quoted by this Court with approval in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), as follows (Op., R. 1252):

> "In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing."

No one questions the correctness of the foregoing rule in so far as it applies to one accused of monopolizing commerce. Without question one who monopolizes cannot defend his actions on the ground that he did not intend to monopolize and the very fact that he succeeded in monopolizing is sufficient to establish the illegal intent. However, where the charge is that the defendant attempted to monopolize commerce and no claim is made that he achieved that end, it necessarily follows that proof of specific intent is necessary to establish that acts falling short of achieving monopolization were done in furtherance of an attempt to monopolize.

The validity of the foregoing statement of law is no more clearly demonstrated than by that portion of the opinion in the *Aluminum* case, *supra*, in which the court considered the elements of an attempt to monopolize as distinguished from monopolizing. There the court in holding that the finding of a specific intent was essential said (pp. 431-432):

> "* * * conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a 'specific intent'; an intent which goes beyond the mere intent to do the act."

The fact that the court below relied upon that portion of the opinion in the *Aluminum* case which deals

with the type of intent required in proof of a charge of monopolizing and ignored that portion of the opinion which deals with the type of intent required to support a charge of attempting to monopolize, clearly indicates that the court believed that general intent inferred from acts done was sufficient as distinguished from specific intent "which goes beyond the mere intent to do the act". (*Ibid.*)

That specific intent is an essential element in the proof of any charge that the defendants attempted to monopolize is well established. In *United States v. Columbia Steel Company*, 334 U.S. 495 (1948) this Court held that "a specific intent to monopolize" must be shown in order to prove an attempt to monopolize within Section 2 of the Sherman Act. There despite the Government's lengthy recital of the long acquisitions by the United States Steel Company, it was held that the company had not intended to monopolize and therefore had not violated the statute. See also *Swift and Co. v. United States*, 196 U.S. 375 (1905); *United States v. General Electric Co.*, 80 F. Supp. 989 (D.C.S.D. N.Y., 1948); *United States v. Quaker Oats Co.*, 232 Fed. 499 (D.C. Ill., 1916).

Even if we concede that the opinion and findings of the court below are ambiguous, the court could not validly have found that defendants were guilty of a specific intent to monopolize. The record is barren of any evidence to support such a finding. The uncontroverted evidence is that the Publishing Company in adopting the unit rate for classified and general advertising adopted the normal and usual practice in the industry for sound business reasons. Furthermore, the entire history of the Publishing Company refutes the

suggestion that the defendants had any intent whatsoever to monopolize.

The unit combination rate for classified advertising was adopted in March, 1935, approximately two years after the Publishing Company acquired the States (R. 666-667, 1127). As early as 1924 the Morning Tribune, the morning edition of The Item Company, Ltd., and The Item, evening edition, established unit combination rates for classified advertising (Fdg. 20, R. 1256; Exs. G-19 and G-20, R. 242, 1307-1308; R. 451, 682). That rate structure continued in effect until The Item Company Ltd., ceased publishing its morning edition in 1941 (Fdg. 20, R. 1256). The use of unit combination rates by publishers having morning and evening editions has long been a common practice in the industry and at the time that the Publishing Company adopted that rate structure on classified advertising about 125 publishing companies were selling classified advertising at unit rates only (Fdg. 20, R. 1256; R. 445-446, 470). The use of the unit combination rate structure for classified advertising results in economies for the publisher and enables him to give more efficient service to advertisers (R. 1127-1129). When the Publishing Company adopted the unit combination rate on classified advertising, it offered a rate lower than the sum of the separate rates for the morning and evening issues (Ex. G-20, R. 242, 1308).

It is inconceivable that the adoption of the unit rate for classified advertising could have been part of an attempt to monopolize. Such a rate structure was a generally recognized trade practice beneficial to both the publisher and the advertiser. The Publishing Company's only local newspaper competitor had been following that

practice for years (Fdg. 20, R. 1256). In the circumstances, the adoption of the practice was far more normal and reasonable than the failure to adopt it would have been. Certainly there is no basis for inferring an intent on the part of the defendants to acquire a monopoly.

In 1950, fifteen years after the adoption of the unit combination rate for classified advertising, the Publishing Company adopted the unit combination rate for general advertising. When the Publishing Company announced its intention to adopt the unit rate in 1949, approximately 180 publishers, constituting the vast majority of publishers publishing morning and evening issues, had in effect unit combination rates. (Fdg. 26, R. 1258; R. 146, 445-446, 474-477). As the defendant Tims testified, the Publishing Company had for many years been working toward the institution of the unit rate (R. 67-68, 87). However, it was desirable to delay the adoption of that rate structure until the States could be built up to the point where the use of the States and The Times-Picayune in combination would be highly attractive to advertisers. Mounting costs in the newspaper business made it necessary to adopt the unit rate structure in February, 1950 (R. 244-225, 475). If this had not been done it would have been necessary to raise the separate rates for The Times-Picayune and the States (R. 475). That the contracts for advertising at the unit rate only were normal, reasonable and lawful contracts has been established (*supra*, pp. 46-75).

The entire history of the Publishing Company contradicts the contention that it had any intent or even desire to acquire a monopoly. In 1941, prior to the change in ownership of The Item, the President of the Publishing Company, L. K. Nicholson, was offered

an opportunity to purchase that paper and refused, saying that he did not want a monopoly but preferred a competitor (R. 590). Again in 1949 prior to the sale of The Item to its present ownership, it was offered to the President of the Publishing Company and Mr. Nicholson again refused, saying that he did not want a monopoly (R. 610).

Throughout the years the Publishing Company has continuously cooperated with The Item on the exchange of mats by an arrangement that has been far more beneficial to The Item than to the Publishing Company (R. 1157-1159). For years the Publishing Company has continuously allowed The Item to use the lobby of its building without charge as a substation for the distribution of newspapers (R. 1143). It has furnished The Item with newsprint when the latter's supplies became depleted.[19] At no time have the defendants required their customers to refrain from using The Item. Every advertiser has always been free to advertise as much as he desires with the Publishing Company or The Item (*supra*, pp. 56-57).

Is such conduct as this the conduct of men engaged in an attempt to monopolize? Can it be said that despite the refusal of the defendant Nicholson to purchase The Item when it was offered to him, he and his company were engaged in attempting to acquire a monopoly? If the defendants have nurtured an intent to monopolize since the decision was reached to adopt the unit rate for classified advertising in 1935, it is indeed strange that there was no subsequent manifestation of that intent until the unit rate for general advertising was adopted

[19] In at least one instance, this resulted in The Item getting advertising which the Publishing Company might otherwise have carried (R. 1158).

in 1950. If those two isolated instances are any evidence of specific intent to monopolize, it is safe to say that defendants are far too dilatory in the role of potential monopolists for there to be any likelihood that they will ever accomplish their designs.

We have shown that the ruling of the court below that defendants have unlawfully attempted to monopolize in violation of Section 2 of the Sherman Act is based on an arbitrary and artificial definition of the market adopted contrary to the applicable principles established by this Court. In so ruling the court ignored the fact that the record is devoid of any evidence that the acts of the defendants created any dangerous probability of monopoly; on the contrary, all relevant evidence points to the opposite conclusion. Furthermore, the court failed to find, and on this record could not have found, the final essential element of the offense, specific intent on the part of the defendants to monopolize. We submit that the holding that defendants violated Section 2 of the Act was plainly erroneous and must be reversed.

IV.

The Present Decree Exceeds the Bounds of Proper and Permissible Relief—The Additional Punitive Provisions Sought by the Government Are Completely Unwarranted.

A. *In Undertaking the Perpetual Regulation of All the Publishing Company's Rates in Accordance with Unworkable Standards, the Court Below Abused Its Discretion in Framing the Decree.*

The only practices held to be illegal in connection with the rate structure of the Publishing Company were the unit rates in force on classified and general

advertising. However, when the court below framed its decree it included injunctive provisions which are much broader than necessary to strike down the rates found to be illegal and which, in effect, undertake to regulate all of the Publishing Company's advertising rates. The significant injunctive provisions of the decree read as follows (R. 1264-1265):

"V.

Defendant, the Times-Picayune Publishing Company, is enjoined and restrained from, directly or indirectly:

A. Offering to sell, contracting to sell, or selling advertising space in any newspaper published by it only upon the condition, expressed or implied, that the purchaser of such space will contract for or purchase advertising space in any other newspaper published by it.

B. Refusing to contract to sell or refusing to sell advertising space separately in each newspaper published by said defendant.

C. Using the dominant position of the defendant, The Times-Picayune Publishing Company, in the morning field, to sell any newspaper advertising at rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans;

PROVIDED that the rates for the sale of general, classified and local display newspaper advertising initially adopted by the defendant, The Times-Picayune Publishing Company, after this judgment becomes final, shall with due notice to the office of the attorney general be presented by said defendant to this Court for approval under the terms of this Section V of this Final Judgment, and subsequent rate cards may thereafter be presented for approval."

If the court below was correct in holding that the unit rates for classified and general advertising are illegal, then there is no question but that paragraphs A and B above are appropriate provisions to be included in the decree. Paragraph A forbids The Publishing Company to sell advertising only at unit rates and paragraph B is merely the converse of that prohibition in that it requires that advertising be offered in all issues of the Publishing Company at separate rates.

The vice of the decree lies in paragraph C which is directed at all advertising rates promulgated by the Publishing Company. By this paragraph the Company is forbidden to use its "dominant position" in the morning field to sell advertising at rates lower than either (1) the cost of producing and selling such advertising, or (2) comparable newspaper rates in New Orleans. These injunctive provisions do not apply to unit rates because unit rates have been abolished. They are not limited in application to combination rates. Neither are they limited in application to rates in the field in which the Government claimed the restraint was imposed, namely, the afternoon field. They apply to any rates which the Publishing Company may offer separately or optionally in any of its issues and in any field.

If we concede for purpose of argument that there is in New Orleans a morning field as distinguished from an afternoon field, there is not the slightest reason for a court's undertaking to regulate separate rates which are applicable to one or the other of those fields alone. It has never been so much as suggested that the defendants engaged in any improper action with respect to the morning field and the Government has never questioned the propriety of the rates applicable to that

field alone. Likewise, there was no finding of any illegality in connection with the rates which were applicable to the afternoon field alone. The sole basis of the decision below is that selling advertising at combined morning and evening rates only is illegal. The court considered only the legality of the use of the unit or forced combination rate. Consequently, the provisions of the decree regulating individual rates are not directed at anything the Publishing Company has done or has threatened to do and are therefore improper.

In so far as paragraph C is also directed at optional combination rates, we think it is equally improper. The Government has never contended that optional combination rates are illegal in and of themselves. In fact it has quite frankly admitted that in seeking a ban on optional combination rates for a period of three years it is asking the Court to impose a prohibition against the Publishing Company engaging in a practice which standing alone would be perfectly legal. At the trial the Government made no attempt to prove that any optional combination rate offered by the Publishing Company had ever been tainted with illegality or that the defendants had in any way abused their right to offer optional combination rates. Consequently, we submit that the court below was not justified in inserting in the decree a provision regulating optional combination rates any more than it was justified in inserting a provision regulating separate rates.

The injunctive provisions of paragraph C are perpetual. They are not limited to a reasonable length of time as is the usual practice. In so far as paragraph C prohibits selling advertising at rates less than the cost of producing and selling such advertising, it is a per-

petual injunction against operating below cost. While it may be flattering for the court to assume that the Publishing Company will never find it necessary to operate in the red, the assumption disregards the realities of the modern economic world. The volume of advertising for a newspaper publisher fluctuates as widely, if not more widely, than does customer volume for any other business. In periods of prosperity advertising volume is high. In periods of recession there is a sharp decline. Even local economic disturbances may have a decided effect upon a newspaper's advertising volume.

In periods of decreasing volume it is seldom practical to avoid operating at a loss by increasing rates. Yet if the Publishing Company must operate perpetually under a requirement that it not sell advertising at rates less than the cost of producing and selling such advertising it would be denied the opportunity to attempt to weather a period of economic adversity and would have no choice but to liquidate its business in order to avoid operating at a loss.

As a matter of fact, the standard set by the court for determining the permissible minimum rates which the Publishing Company may charge for advertising space is completely unworkable. No cost accounting system has ever been devised by which the unit cost of any particular advertisement or class of advertisements can be computed. If anything was proved in this case it was that cost accounting is a highly controversial and theoretical subject and impossible of accurate, fair, and definite definition insofar as its theoretical or practical application for the purposes of the decree in this case are concerned. (R. 920-944, 982-984, 997-1067).

Moreover, the undisputed evidence in this case

clearly and conclusively demonstrates that the fixing of advertising rates is largely a matter of trial and error in the light of the competitive situation and economic conditions. (R. 224-225, 241.) The merit of any particular rate schedule can only be judged by the results which it produces. (R. 241.) Nevertheless, the Government is seeking to deprive the Publishing Company of the right to price its own products, by substituting the court as rate maker. Necessarily rates for different classes and sub-classes of advertising are set at wholly different levels without relation to costs but as the results of many different factors: competitive, historical, the impact of other media, the bargaining power of advertisers, etc. To say whether any particular rate will produce revenues equal to the cost of producing and selling the class of advertising to which it is applicable is obviously impossible.

Even if we construe paragraph C as merely requiring that total revenues produced by the entire rate structure, as distinguished from rates for any particular class of advertising, equal the cost of producing and selling advertising, the requirement is equally unworkable. The content of a newspaper is divided roughly into editorial matter and advertising matter. To produce this content it is necessary to have an editorial staff, an advertising staff, a mechanical staff and a supervisory staff as well as a physical plant. Practically all revenues are derived from circulation and advertising. What possible formula could be developed for distributing costs between a newspaper's function of gathering and disseminating news and its function of producing and selling advertising?

It may be suggested that paragraph C only comes

into operation when the Publishing Company uses its "dominant position in the morning field" to sell advertising. As we have said before, we are at loss to understand what the court meant by "dominant position." If the court meant that the Times-Picayune is the only morning issue circulated in New Orleans and that its circulation and advertising lineage are greater than either that of The Item or the States, the fact is true; but it is a fact that came into existence through no fault of the Publishing Company and undoubtedly will continue to exist until competition brings about a change. So long as that condition does exist it is difficult to see how the Publishing Company could ever sell one line of advertising without laying itself open to the accusation that it was using its "dominant position in the morning field" in doing so.

As for the provision that rates may be reduced to those equivalent to comparable newspaper advertising rates in New Orleans, it is unlikely that this provision will prove of any significance. No two newspaper publishers have identical rates structures. Differences in volume and type of circulation as well as a great many other factors make it possible for one publisher to operate on an entirely different rate scale from another. Rates are not defined so no one knows whether the court meant that agate line rates should be comparable or that milline rates should be comparable. For a court to establish any proper basis for comparing the rates of one publisher with those of another is next to impossible.

The unworkability of the injunctive provisions of paragraph C as demonstrated above is proof of the impracticability and undesirability of any attempt to regulate newspaper advertising rates by judicial fiat.

Courts are as ill-equipped to undertake that task as they are the investigations necessary to determine under what circumstances news gathered by a private agency should be deemed affected with a public interest.[50]

Furthermore, it must be recognized that advertising revenues are the life blood of any newspaper. Necessarily any regulation of advertising amounts to a regulation of advertising revenues and as such suggests more than a bare possibility of regulating the newspaper itself. The very possibility of such regulation at least approaches the zone where encroachment on the freedom of the press is possible.[51]

Perhaps our fears are unjustified but inasmuch as the illegality found by the court below to exist in no way required the imposition of the regulatory provisions of paragraph C there would seem to be no reason for imposing them and thus suggesting the grounds for such fears. If we are right in believing that the regulatory provisions of paragraph C do approach dangerously near

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[50] Mr. Justice Brandeis in his dissenting opinion in *International News Service v. Associated Press*, 248 U.S. 215 (1918) said (p. 267):

> "Courts are ill-equipped to make the investigations which should precede a determination of the * * * circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. * * * *"

[51] Defendants have never taken the position that the First Amendment guaranteeing the freedom of the press permits them to disobey the antitrust laws. However, we do believe that the freedom of the press is an important consideration whenever a court is asked to impose regulatory injunctive provision on any newspaper. Our specification of error No. 10 reads as follows:

> "10. [The court erred] In fixing newspaper advertising rates by court decree in violation of 'Freedom of the Press' provisions of the First Amendment of the United States Constitution."

It is not our intention to argue further in this brief the applicability of the First Amendment, but we are relying on our specification No. 10 and are in complete accord with the views expressed in regard to this point in the brief of the *amici curiae*.

to the zone where encroachment on freedom of the press is possible, then unquestionably the provision should be stricken from the decree. As Mr. Justice Frank further said in his dissenting opinion in *International Salt Co. v. United States*, 332 U.S. 392 (1947) (p. 403):

> "* * * No doubt, when a court condemns practices as violative of the Sherman Law and the Clayton Act, it has the duty so to fashion its decree as to put an effective stop to that which is condemned. But the law also respects the wisdom of not burning even part of a house in order to roast a pig. Ordinarily, therefore, when acts are found to have been done in violation of antitrust legislation, restraint of such acts in the future is the adequate relief. * * * "

The Government will no doubt argue in support of paragraph C, as it will argue in support of the additional injunctive provisions which it seeks, that such provisions are necessary to prevent evasion of the positive prohibitions of the decree by subterfuge. But this is not a case in which there has been demonstrated a "proclivity to unlawful conduct" on the part of the defendants. Cf. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 147 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186 (1944).

The evidence here establishes that defendants have not acted in gross and flagrant disregard of the law but rather, reasonably thought that their action was legal. Approximately 180 newspapers throughout the country have a similar advertising rate structure (Fdg. 26, R. 1258). The practice had been used in the industry for more than forty years and this case is the first time that the Government has ever questioned its legality (R. 114, 333-334). Moreover, defendant Publish-

ing Company's local newspaper competitor had adopted the practice eleven years before and was still then using it. Certainly the defendants had no reason to believe that the adoption of the unit rate would possibly be considered a violation of law. It is well settled that when a particular activity is called into question and it is shown that the defendants could reasonably have thought their actions legally permissible, less stern measures of relief are called for than where the defendants have acted in gross disregard of the law. *United States v. U. S. Steel Corp.*, 251 U.S. 417, 457 (1920).

The principles applicable to the formulation of decrees in cases such as this are succinctly stated in *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945). In that case this Court said (pp. 409-10):

> "The applicable principles are not doubtful. The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violaton. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed or that the court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable. But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' busi-

ness at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land'. * * *."

It is submitted that paragraph C of the decree imposes penalties on the Publishing Company in the guise of preventing future violations. The result is to subject the Publishing Company to unwarranted regulation by the court. If the provision stands the Publishing Company will be hereafter placed in a different class from others similarly situated and will be subjected to regulation by standards so vague that it can only conduct its business at the peril of answering to the court for contempt for each transaction.

B. *The Injunctive Provisions Proposed by the Government But Denied by the Court Below Are Entirely Unwarranted.*

The Government has appealed from the refusal of the District Court to include in its decree the following provisions (R. 1275-1276):

> "V-C. Entering into, adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in any single newspaper where such space is not sold in combination with advertising space in any other newspaper published by the defendants or any of them, the rate for which is based upon or determined by the volume of advertising space to be purchased or purchased in any other newspaper published by the defendants or any of them.
>
> V-D. Entering into, adhering to or claiming any right under any contract, agreement, or understanding for the sale of advertising space in more than one newspaper published by the defendants or any of them, the combined rate for which is:

1. During a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by defendants or of any of them which is included in the combined rate, or

2. After a period of 3 years following the effective date of this final judgment, lower than the sum of the rates for the same amount of advertising space when purchased separately in each of the newspapers published by the defendants or any of them which is included in the combined rate, minus such amount as the defendants or any of them can show represents savings in costs to the publisher or publishers resulting from the production and sale of such advertising in combination."

Paragraph V-C is apparently directed at the long established practice of the Publishing Company of offering retail advertisers using either The Times-Picayune or the States the opportunity to place advertising in the other issue at reduced rates based on the volume placed in the issue used by the advertiser as his primary advertising medium (Fdg. 32, R. 1259; Ex. G-92, R. 189, 1408-1409; R. 230-234, 237-239, 241-242). Stated otherwise, the practice sought to be enjoined is simply a means of giving advertisers a quantity discount on all business done with the Publishing Company.

In the trial of this case the only evidence offered with respect to retail advertising rates was that the Publishing Company followed the practice outlined. The Government did not contend that the practice was illegal and offered no evidence as to its effect or its reasonable-

ness or unreasonableness.[52] It ill-behooves the Government to wait until after the completion of the trial in which defendants were led to believe that the matter was not in issue to ask any court to enjoin a practice which was not then under attack and with respect to which defendants had no opportunity to present their defense. Cf. *Associated Press v. United States*, 326 U.S. 1, 22-23 (1945).

Sub-paragraph 1 of paragraph V-D is plainly a punitive provision. The Government is asking the Court to prohibit the Publishing Company for a period of three years from offering any optional combination rate. As pointed out above, this is not a case in which the defendants have shown a "proclivity for unlawful activity" but one in which they adopted a practice common in the industry which had been unchallenged for more than forty years (Fdg. 26, R. 1258; R. 114, 333-334). Certainly it would be not only unreasonable but unjust to apply such a punitive measure against the Publishing Company under the circumstances. It is well settled that a decree must be curative, not punitive, and remedial, not regulatory. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945); *Standard Oil Co. v. United States*, 221 U.S. 1, 77-78 (1911).

Although sub-paragraph 2 of paragraph V-D pur-

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[52] In the final argument Government counsel, Mr. Kramer, said (Tr. Final Argument, July 12, 1951, pp. 100-101):

> "That takes me to what I think candor compels to take me and that is to the local display advertising rates of these Defendants here.
>
> In the final brief we submitted, not the reply brief, we were careful not to contend and we do not now contend—We have learned something and I am not ashamed to admit it—that these contracts are in unreasonable restraint of trade on the basis of the record now before the Court or on the basis of any evidence that the Government now has because the Government did not show that any advertiser felt economically compelled to take the States or the other way around if he wanted the other papers."

ports to permit optional combination rates after a period of three years, it is so restricted that it is doubtful if the Company could ever do so. By the terms of that paragraph the Company could only offer a combination rate less than the sum of separate rates if it could demonstrate with mathematical precision that the reduction equalled the savings in costs due to producing and selling the advertising in combination. Every reason set forth *supra*, pp. 95-96, with respect to the unworkability of the cost accounting provisions contained in paragraph C of the court's decree are equally applicable here. Experts and cost accountants differ as to proper theories of cost accounting in different factual situations and businesses, and it is admitted that the field of cost accounting is highly controversial and that no theoretically sound and logical system of accounting can be devised to guarantee accurate and fair standards of costs in a publishing business such as defendant conducts insofar as optional combination rates are concerned. The decree, lacking scientific and accurate standards of cost accounting, establishes for the future an unfair, arbitrary and perpetual regulatory and rate making power in the Federal courts based on such impossible standards. However, the provision proposed by the Government is much more vicious because it places on the defendants the burden of demonstrating that separate rates are only reduced by an amount equal to the savings effected by selling in combination. Obviously it would be impossible to meet this test.

It should suffice to point out the impracticability of sub-paragraph 2 of paragraph V-D. However, we call the Court's attention to the fact that under this provision defendants are perpetually required to meet its terms and denied the right to meet competition re-

gardless of the fact that at any time they may be faced with a competitor who is offering a combination rate. In effect, the Government is asking the Court to write into the decree a provision which is even more drastic than Section 2 of the Robinson-Patman Act.[53]

Nothing in this case warrants the drastic punitive measures which the Government is seeking to have added to the decree. We submit that if unit rates are held to be illegal, prohibiting the use of such rates and requiring the offering of separate rates affords complete and efficacious relief. There is no basis whatever for any fears on the part of the Government that the defendants will attempt to evade the decree by subterfuge. But even if such should occur, we have no doubt as to the power and ability of the court below to take adequate measures to protect the public interest and enforce its decree. The court by retaining jurisdiction of this cause has left it open to the Government to apply for further relief if the decree should prove inadequate. In the circumstances, a decree prohibiting those acts found to be illegal is plainly sufficient. *Associated Press v. United States*, 326 U.S. 1, 22-3 (1945); *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947).

CONCLUSION

We cannot believe that this Court will radically extend the interpretation and application of the Sherman Law by affirming the decision of the district court which establishes a new and novel principle and definition of monopoly. If the decree of the lower court

[53] The Federal Trade Commission has taken the position that a sale of advertising space is not a sale of a "commodity" within the meaning of the Robinson-Patman Act. Informal opinion of FTC, 81 Cong. Rec. 8/25/37, CCH Trade Reg. Service, paragraph 2212, 127. See also, *Fleetway, Inc. v. Public Service Interstate Transportation Co.*, 72 F. 2d 761 (3rd Cir. 1934).

is affirmed it will mean that every newspaper and every business of any kind in any city, locality, or geographic area which has a temporary and transient so-called dominant position in a competitive field, is to be treated as if it were a monopoly within the meaning of the Sherman Law, and subjected to future and continuous regulation of its rates or prices and activities by the Federal courts. If such a radical and novel principle is adopted, the Federal courts will have to perform functions similar to the Interstate Commerce Commission and other administrative tribunals. This will be a far cry from the case of *United States v. Aluminum Company of America*, 148 F. 2d 416 (C.C.A. 2, 1945), and the similar kinds of monopoly this court has in the past considered as falling within the meaning and intent of Section 2 of the Sherman Law.

For the reasons stated above it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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